(21)

No. 96-1577-CFX
Status: GRANTED

Title: Alaska, Petitioner
v.
Native Village of Venetie Tribal Government, et al.

Docketed:
April 4, 1997

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Botelho,Bruce Manuel, Roberts Jr.,John G.

Counsel for respondent: Kendall,Heather R.

Entry	Date	Note	Proceedings and Orders
1	Apr 4 1997	G	Petition for writ of certiorari filed. (Response due May 20, 1997)
3	Apr 28 1997		Order extending time to file response to petition until May 20, 1997.
4	May 20 1997		Brief of respondents Native Village of Venetie Tribal Government, et al. in opposition filed.
5	May 20 1997		Brief amici curiae of California, et al. filed.
6	May 20 1997		Brief amicus curiae of Theodore F. Stevens filed.
7	May 20 1997		Brief amici curiae of Legislature of the State of Alaska, et al. filed.
8	May 20 1997		LODGING consisting of ten copies of two maps submitted by counsel for the amici Legislature of the State of AK, et al.
10	Jun 2 1997	X	Reply brief of petitioner Alaska filed.
9	Jun 3 1997		DISTRIBUTED. June 19, 1997 (Page 2)
11	Jun 23 1997		Petition GRANTED. SET FOR ARGUMENT December 10, 1997. **********
13	Jul 3 1997		Order extending time to file brief of petitioner on the merits until August 21, 1997.
14	Jul 29 1997		Brief amicus curiae of Shee Atika, Incorporated filed.
15	Aug 21 1997		Joint appendix filed.
16	Aug 21 1997		Brief of petitioner Alaska filed.
17	Aug 21 1997		LODGING consisting of ten copies of Interior Department Solicitor's opinion, January 11, 1993.
18	Aug 21 1997		Brief amici curiae of Alaska Fish & Wildlife Federation and Outdoor Council,et al. filed.
19	Aug 21 1997		Brief amici curiae of California, et al. filed.
35	Aug 21 1997		Brief amici curiae of Council of State Governments, et al. filed.
21	Aug 26 1997		Order extending time to file brief of respondent on the merits until October 14, 1997.
22	Sep 16 1997	*	Record filed. Partial record proceedings United States Court of Appeals for the Ninth Circuit.
30	Oct 10 1997		Brief amici curiae of Navajo Nation, et al. filed.
23	Oct 14 1997		Brief of respondents Native Village of Venetie Tribal Government, et al. filed.
24	Oct 14 1997		LODGING consisting of ten copies of two paper bound books, Crow Dog's Case: American Indian Sovereignty, Tribal Law, etc., 1994, and Alaska Natives and American

2 pp

No. 96-1577-CFX

Entry	Date	Note	Proceedings and Orders
			Laws,1984, submitted by counsel for the respondent.
25	Oct 14 1997		Brief amicus curiae of Tanana Chiefs Conference filed.
26	Oct 14 1997		LODGING consisting of twelve copies of five documents referenced in brief amicus curiae of Tanana Chiefs Conference submitted by counsel for amicus
27	Oct 14 1997		Brief amici curiae of Alaska Federation of Natives, et al. filed.
28	Oct 14 1997		LODGING consisting of ten copies each of the following: Looseleaf binder entitled "Alaska Natives and the Land, newspaper "Indian Country", publication "Public Safety and the Justice System", law review article, "Village Council and Its Offspring", submitted by counsel for AK Federation of Natives, et al.
29	Oct 14 1997		Brief amicus curiae of Koniag, Inc. filed.
31	Oct 14 1997		Brief amicus curiae of Metlakatla Indian Community filed.
32	Oct 14 1997		Record filed.
		*	Original trial exhibits submitted by respondent. (2 BOXES).
33	Oct 14 1997		Brief amici curiae of Indian Law Professors filed.
34	Oct 24 1997		CIRCULATED.
36	Nov 12 1997	X	Reply brief of petitioner Alaska filed.
37	Nov 17 1997		Record filed.
		*	Record proceedings U.S. Court of Appeals for the Ninth Circuit.
38	Nov 24 1997		Record filed.
		*	Record proceedings U.S. District Court, District of Alaska (2 boxes).
39	Dec 10 1997		ARGUED.

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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF ALASKA,

Petitioner,

v.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Forty-four million acres of Alaska land were conveyed to state-chartered, Native-owned corporations pursuant to the Alaska Native Claims Settlement Act of 1971 ("ANCSA" or "Act"). The respondent Native Village owns a 1.8 million-acre expanse of ANCSA land located in north-central Alaska. The Ninth Circuit held that this land is "Indian country" within the meaning of 18 U.S.C. § 1151(b), making respondent sovereign over a piece of Alaska about the size of the State of Delaware, overturning a fundamental jurisdictional premise upon which Alaska has been governed for more than a century, and rendering uncertain the jurisdiction of the State and the more than 225 Native villages occupying ANCSA land to govern vast areas of Alaska. The questions presented are:

1. Whether the Ninth Circuit correctly held—in conflict with the clear intent of Congress in enacting ANCSA, the decisions of the Alaska Supreme Court, and the interpretation of the federal agency charged with implementing ANCSA—that ANCSA land may constitute Indian country within § 1151(b).

2. If so, whether the Ninth Circuit correctly held—in conflict with the decisions of this Court and other federal circuits—that the determination whether land is Indian country within § 1151(b) should depend upon an *ad hoc*, six-part balancing test incapable of producing predictable results.

PARTIES TO THE PROCEEDINGS

Petitioner, plaintiff-appellee below, is the State of Alaska. It brought this action on its own behalf and on behalf of Yukon Flats School District, Unalakleet/Neeser Construction JV, Unalakleet Native Corporation, Neeser Construction Company, and Gerald Neeser. Yukon Flats School District is organized under state law, Alaska Stat. § 14.08.031, and administers public schools in north-central Alaska. The other entities are the joint venture, along with its principals, which contracted with the school district to construct a public school facility in Venetie. Under the contract the State assumed liability for taxes levied in connection with the project by an entity other than the State, federal government, or state municipality. *See* Am. Compl. for Decl. and Inj. Relief ¶¶ 1, 2, 14.

Respondents, defendants-appellants below, are the Native Village of Venetie Tribal Government, the Venetie Tax Court, the Venetie Tax Commission, Gideon James, Lawrence Roberts, Larry Williams, Ernest Erick, Lincoln Tritt, John Titus, and David Case. The individuals are tribal officers or members of the tax court or tax commission, who claim authority to collect the taxes at issue or to enforce them through judicial proceedings. They are sued in both their individual and official capacities. *See id.* ¶¶ 3-8. We refer to respondents collectively as the "Native Village of Venetie" or "Village."

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No. 96-

STATE OF ALASKA,
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NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

The State of Alaska petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit opinion is reported at 101 F.3d 1286 and reprinted in the appendix hereto ("App.") at 1a. That opinion reversed the order of the District Court for the District of Alaska on Indian country, which is unreported and reprinted at App. 37a. The District Court order on tribal status, which was not appealed, is unreported and reprinted at App. 80a. The Ninth Circuit opinion in the prior appeal is reported at 856 F.2d 1384 and reprinted at App. 127a. That opinion affirmed the District Court ruling granting a preliminary injunction, which is unreported and reprinted at App. 141a.

JURISDICTION

The judgment of the Court of Appeals was entered on November 20, 1996. App. 1a. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on January 6, 1997. *Id.* 143a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Alaska Native Claims Settlement Act of 1971 ("ANCSA" or "Act"), 43 U.S.C. § 1601 *et seq.*, and 18 U.S.C. § 1151, are reprinted at App. 145a-172a.

INTRODUCTION

This case presents jurisdictional issues of extraordinary importance to the governance of this Nation's frontier state. It involves a dispute between the State of Alaska and the Native Village of Venetie over the basic question of which body is sovereign over a 1.8 million-acre expanse of land located in north-central Alaska, which was conveyed as part of the final settlement of aboriginal claims effected by ANCSA. The dispute arises from the Village's efforts to assess $161,000 in taxes upon a state contractor doing business in Venetie. It turns on whether Venetie is "Indian country" within the meaning of 18 U.S.C. § 1151, and, more particularly, whether it is a "dependent Indian community" within subsection (b) of that provision.[1]

Indian country is the jurisdictional touchstone for delineating federal, state, and tribal sovereignty over Indian-occupied lands. Within it Indian tribes have broad authority to tax and regulate the land as well as Indians and non-Indians who enter upon it. States, on the other

[1] Under 18 U.S.C. § 1151, land is Indian country if it is (a) an "Indian reservation," (b) a "dependent Indian communit[y]," or (c) an "Indian allotment." *Id.* This case concerns only the second type of Indian country.

hand, are precluded from exercising fundamental attributes of their sovereignty within Indian country, particularly in the areas of taxation and regulation. Since territorial times, Alaska has been governed on the basic jurisdictional premise—reinforced by the courts—that Indian country does *not* exist in Alaska, especially in the wake of ANCSA. That fundamental premise—affecting government operations at all levels—was obliterated by the Ninth Circuit below.

Overturning the Alaska District Court, a divided panel of the Ninth Circuit held that ANCSA land may constitute Indian country within § 1151(b). Then, applying an *ad hoc*, six-part balancing test, the panel ruled that the 1.8 million-acre Venetie tract *is* Indian country. In so ruling, the Ninth Circuit made the Native Village of Venetie sovereign over a piece of Alaska about the size of the State of Delaware. But that is perhaps the least of it. More than 40 million acres of Alaska land—an area on a scale with the *entire* area of Indian lands in the contiguous United States—are subject to ANCSA and are dispersed throughout the State.[2] The Ninth Circuit decision subjects that land to claims of Indian country status, calling into question the jurisdiction of the State to govern vast areas of Alaska.

This decision has enormous consequences for all of Alaska. As Judge Fernandez observed below, the Ninth Circuit decision invites "a blizzard of litigation throughout the State * * * as each and every tribe seeks to test the limits of its power over what it deems to be *its* Indian country," asserting "claims to freedom from state regulation, claims to regulate and tax for tribal purposes, assertions of sovereignty over vast areas of Alaska, and even assertions that tribes can regulate and tax the various corporations created to hold ANCSA land." App. 35a (emphasis added). Out of that "chaos" will emerge a

[2] A map of Alaska showing the lands conveyed under ANCSA—including Venetie—is reproduced at App. 173a.

"crazy quilt" of jurisdictional enclaves, crippling the State's ability to implement crucial state-wide regulatory programs—including fish and game, land use, and environmental programs. *Id.* 36a.

All of this, moreover, comes like a bolt out of the blue. The Ninth Circuit decision contravenes the clear intent of Congress in enacting ANCSA. It breaks ranks with the Alaska Supreme Court, which has held that "[t]here is not now and never has been an area of Alaska recognized as Indian country." *Native Village of Stevens* v. *Alaska Management & Planning*, 757 P.2d 32, 35 (Alaska 1988) (internal quotation marks omitted). And it completely ignores the views of the Department of the Interior—the agency charged with implementing ANCSA—which in 1993 issued a 133-page opinion categorically concluding that "[ANCSA] precludes the treatment of lands received under that Act as Indian country."[3] At the same time, the decision exacerbates a long-standing conflict among the federal circuits over the test for determining Indian country within § 1151(b), and—in fashioning a new, six-factor test—contravenes this Court's precedents establishing that jurisdictional rules in particular should be clear, easy to apply, and capable of producing predictable results.

Before Alaska is plunged into the chaos and confusion wrought by the Ninth Circuit decision, this Court should grant the writ and address the threshold jurisdictional questions presented.

STATEMENT OF THE CASE

1a. There are more than 225 Native villages in Alaska recognized as Indian tribes, scattered across a land mass about the size of Arizona, California, Oregon, Washington, and Montana—combined.[4] The members of the Native Village of Venetie—descendants of the Neets'aii Gwich'in—reside in the communities of Arctic Village and the Village of Venetie in north-central Alaska. In 1943 the federal government designated 1.8 million acres of land around these villages as a reservation. App. 2a. That reservation, however, was expressly revoked by ANCSA. 43 U.S.C. § 1618(a).

b. Congress passed ANCSA in 1971 to settle claims of aboriginal title in order to promote economic development and "maxim[ize] participation by Natives in decisions affecting their rights and property * * * without establishing a reservation system or lengthy wardship or trusteeship." *Id.* § 1601(a) & (b). The Act extinguished all aboriginal title to land and claims based on that title in exchange for some $962 million and 44 million acres of land (including subsurface rights), which were conveyed to more than 225 state-chartered regional and village corporations created under the Act, owned and operated by Natives as for-profit businesses subject to state law. *Id.* §§ 1606, 1607, 1611. By all accounts, ANCSA marked a dramatic break from prior federal Indian legislation. *See* App. 3a, 33a, 69a.[5]

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[3] Dep't of the Interior, Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers, Sol. Op. M-36975, p. 131 (Jan. 11, 1993) (hereinafter "DOI Op.").

[4] The following factual account is drawn primarily from the findings of the Alaska District Court below, which the Ninth Circuit "accept[ed] * * * without objection." App. 26a n.5. The lack of any factual dispute makes this case an ideal vehicle for addressing the important questions presented.

[5] *See also* DOI Op., p. 107 ("ANCSA * * * reflect[s] a new approach on an unprecedented scale in defining the relationship between Alaska Natives and the Federal Government"); Felix S. Cohen, Handbook on Federal Indian Law 740 (1982 ed.) ("[ANCSA] differs from usual models for resolving Indian claims and adjusting federal-Indian relationships in that it gives an extraordinary degree of control to Native people and Native operated institutions"); Blythe W. Marston, *Alaska Native Sovereignty: Testing the Limits of the "Tribe" and "Indian Country" Analysis*, 17 Cornell Int'l L. Rev. 375, 404 (1984) ("Congress intended ANCSA to be entirely different from previous Indian legislation");

c. Arctic Village and the Village of Venetie each established an ANCSA corporation. *Id.* 4a. In 1973 these corporations elected to take fee title to the 1.8 million-acre Venetie tract pursuant to 43 U.S.C. § 1618(b). Six years later, the corporations deeded this land to the Native Village of Venetie Tribal Government, then were dissolved. App. 4a. The Village thereupon asked the federal government to hold the land in trust, but the government refused to do so "in light of the clear expression of congressional intent in ANCSA *not* to create trusteeship or a reservation system." DOI Op., p. 112 n.276 (emphasis added). *See* App. 78a n.40. In 1980 the Village sought federal approval of an oil and gas exploration agreement between the Village and a private company, but the government rejected that request as well, reiterating that under ANCSA it has no trust relationship with Venetie. *See* note 16, *infra*.

The State funds and operates the public schools in Venetie, provides health care and law enforcement services to Village members, makes unemployment insurance payments to Village members, finances water, electricity, and other public utility projects, and funds and oversees various community projects. *Id.* 66a-67a & n.28, 74a. The Village also receives federal assistance, but, as the District Court found, that assistance "is now available in the form of grants and other programs which are administered by Native people themselves with general oversight by agencies as opposed to direct agency services to the tribe." *Id.* 66a-67a.

d. In 1978 the Village adopted a five percent gross receipts tax on businesses operating in Venetie. In 1986 the State, through the Yukon Flats School District, entered into a contract with a joint venture for the construction of a public school facility in the Village, to be financed with state funds. That same year the Village

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Nenana Fuel Co. v. *Native Village of Venetie*, 834 P.2d 1229, 1238-39 (Alaska 1992) (Moore, J., concurring).

replaced its gross receipts tax with a five percent business activity tax on "source gains" derived from commercial activities on its land. In December 1986 the Village notified the contractor that it owed $161,000 pursuant to this tax. When neither the contractor nor the State—"the party responsible for paying the tax" under the contract, *id.* 4a—paid the tax, the Village sought to collect it in tribal court from the State, the school district, and the contractor. *Id.*

2a. The State thereupon brought this federal action for declaratory and injunctive relief in the Alaska District Court, challenging the Village's jurisdiction to impose the tax. The Village moved to dismiss, arguing, *inter alia*, that, as an Indian tribe, it is entitled to tax non-Natives who engage in commercial activities in Venetie because the land is "Indian country" within 18 U.S.C. § 1151(b). The District Court rejected that motion and preliminarily enjoined the Village from attempting to collect the tax. App. 4a, 141a. The Ninth Circuit affirmed the preliminary injunction, observing that "in light of the large number of similar Native Alaskan communities in Alaska, this is a very important case raising far-reaching issues." *Id.* 140a.

b. On remand the District Court ruled in December 1994 that "the Neets'aii Gwich'in are a sovereign tribe as a matter of common law," and thus are entitled to govern their *own members*. *Id.* 126a.[6] That ruling was not appealed and is not at issue here. In August 1995, however, the District Court ruled that the 1.8 million-acre Venetie tract is *not* Indian country within 18 U.S.C.

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[6] Generally speaking, Indian tribes may govern their own internal affairs, and thus may "punish tribal offenders," "determine tribal membership," "regulate domestic relations," and "prescribe rules for inheritance for members." *Montana* v. *United States*, 450 U.S. 544, 564 (1981). Tribal jurisdiction to regulate land and the activities of non-members, however, turns on whether the tribes occupy Indian country. That is the nub of the dispute here.

§ 1151(b), and that, accordingly, the Village is not sovereign over the *land* and lacks authority to tax the commercial activities of non-Natives upon it. App. 79a.

Although it applied a four-factor test in reaching that result, *id.* 58a, the District Court focused on "the question of whether land has been validly set apart for the use of Indians as such, under superintendence of the government." *Id.* 49a. The court regarded these criteria —superintendence and set aside—as the critical factors in this Court's own Indian country cases, *see id.* 44a-49a, and found them "dispositive" of the case before it in the wake of ANCSA. *Id.* 57a n.15. *See id.* 59a.

The District Court concluded that "[s]uperintendence * * * exists for purposes of section 1151(b) where the degree of congressional and executive control over the tribe is so pervasive as to evidence an intention that the federal government, not the state, be the dominant political institution in the area." *Id.* 65a. The court ruled that such superintendence was plainly absent under ANCSA. *Id.* 67a-72a. The court reached the same conclusion as to the requisite set aside. ANCSA expressly revoked the Venetie reservation, and the land in question was not set apart by the federal government for the use of Indians as such, but rather was conveyed by it to state-chartered, ANCSA corporations to do with the land as they saw fit. *Id.* 70a, 77a-79a.

c. The Native Village of Venetie appealed, and a divided panel of the Ninth Circuit reversed. The panel adopted the District Court's factual findings, *id.* 26a n.5, but reversed its Indian country ruling, holding that "[ANCSA] did not extinguish Indian country in Alaska as a general matter, and that the land Venetie occupies is Indian country." *Id.* 2a.

The panel "reject[ed] the notion"—which "appeare[d] to be determinative in the district court"—"that federal supervision must be 'dominant' in order to satisfy the

superintendence prong of the Indian country test." *Id.* 20a. Instead, the panel concluded, "the litmus test of federal superintendence is whether the federal government has abandoned its trust responsibilities * * * clearly and explicitly." *Id.* 20a-21a. The panel also rejected the District Court's four-factor test for determining whether land constitutes Indian country, concluding instead that a "more textured *six*-factor inquiry" was required. *Id.* 12a (emphasis added).

Despite the fact that—as the panel put it—"ANCSA appears to implement, in no uncertain terms, a policy of Native self-determination that is fundamentally at odds with the paternalistic echoes of the trust relationship," *id.* 24a, the panel held that ANCSA failed the Ninth Circuit clear-statement rule. *Id.* 32a. In doing so, the panel ignored ANCSA's express extinguishment of claims based on aboriginal title, 43 U.S.C. § 1603(c), its revocation of Indian reservations, *id.* § 1618(a), and numerous other provisions of the Act. Having swept ANCSA to one side, the panel then proceeded—within the loosely worded contours of its multifaceted balancing test—to conclude that Venetie is Indian country within § 1151(b). App. 31a.

d. Judge Fernandez wrote separately. He shared the District Court view that "ANCSA was intended to be and was something very different." *Id.* 33a. Through ANCSA Congress sought "to separate the land * * * from the tribes themselves." *Id.* 34a. "The tribes would continue as sovereigns, but there would be no more Indian country because the land would not be set aside by the United States for use of the Indians as such," and "would [not] remain under the superintendence of the [federal] government." *Id.* 33a (internal quotation marks omitted). Thus, tribes could govern *themselves*, but "[a]s far as the land was concerned, the regular state and federal political entities would have and retain the necessary power." *Id.* 35a.

The panel opinion "confuse[d] matters by applying out-of-date theories to a truly new concept of Indian relationships and sovereignty." *Id.* Its result not only flouts congressional intent, but invites "a blizzard of litigation throughout the State of Alaska as each and every tribe seeks to test the limits of its power over what it deems to be its Indian country." *Id.* The aftermath: a "crazy quilt" of state and tribal jurisdictional enclaves in Alaska and precisely "the kind of chaos that the [ANCSA] Congress wisely sought to avoid." *Id.* 36a. Judge Fernandez nevertheless felt obliged to join the panel opinion in light of prior Ninth Circuit case law he found binding on the Indian country issue. *Id.*

On January 6, 1997, the Ninth Circuit denied the State's petition for rehearing. *Id.* 143a. Two weeks later, however, the court stayed its mandate until final disposition by this Court. *Id.* 142a.

REASONS FOR GRANTING THE WRIT

I. THE JURISDICTIONAL QUESTIONS PRESENTED ARE EXTRAORDINARILY IMPORTANT AND SHOULD BE DECIDED BY THIS COURT.

1. It is difficult to overstate the importance of this case. Its geographic magnitude, to begin with, is gigantic. The Ninth Circuit decision makes the respondent tribal government sovereign over a piece of Alaska roughly the size of Delaware. *See* App. 110a n.49. Yet the stakes are much higher. The decision below directly impacts the validity of state and tribal jurisdiction over the more than 40 million acres of land conveyed under ANCSA. While dispersed throughout the State, this land in the aggregate is larger than 32 of the individual states. It is, moreover, almost as large as the entire area of Indian lands in the contiguous United States, which totals some 56 million acres. DOI, *American Indian Today* 9 (3d ed. 1991). If permitted to stand, in other words, the Ninth Circuit

decision could nearly *double* the amount of Indian country in the United States.

This geographic magnitude alone is a compelling reason to grant the writ. In *Andrus* v. *Utah*, 446 U.S. 500, 506 (1980), for example, the Court explained that it granted certiorari "[b]ecause the dispute between the parties involves a significant issue regarding the disposition of vast amounts of public lands." The "vast amounts" of land involved in that case comprised some 571,000 acres, *id.* at 506 n.6—less than one-third the size of Venetie alone and a minuscule fraction of the tens of millions of acres of ANCSA land riding on this case. *See also Andrus* v. *Idaho*, 445 U.S. 715, 722 (1980) (certiorari granted to resolve status of "some 2.4 million acres of desert land within Idaho"); *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36, 42 (1983) (certiorari granted "[i]n view of the importance of the case to the administration of * * * more than 33 million acres of land").

2a. Yet it is not so much the geographic breadth of this case—but rather its jurisdictional significance—which makes it so important. Indian country is the jurisdictional touchstone for delineating federal, state, and tribal authority over Indian-occupied lands. *See Narragansett Indian Tribe* v. *Narragansett Elec. Co.*, 89 F.3d 908, 915 (1st Cir. 1996); Cohen, *supra*, at 27. Within it tribes possess broad authority—subject to federal limitations—to govern not only their own members, but also the land and nonmembers. States, on the other hand, are precluded from exercising fundamental attributes of their sovereignty within Indian country. *See New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983); *DeCoteau* v. *District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 427 & n.2 (1975).[7]

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[7] While most states are precluded from exercising criminal jurisdiction over Indians within Indian country, Public Law 280 grants six states—including Alaska—such jurisdiction. *See* 18 U.S.C.

Within Indian country, for example, state authority to regulate hunting and fishing, *New Mexico* v. *Mescalero Apache Tribe*, as well as gambling, *California* v. *Cabazon Band of Mission Indians*, is restricted. So too is state jurisdiction to tax Indian activities or property, *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 115 S. Ct. 2214 (1995), and even to tax non-Indians, *Ramah Navajo School Bd.* v. *Bureau of Revenue*, 458 U.S. 832 (1982). *See DeCoteau*, 420 U.S. at 427 n.2 ("[state] jurisdiction is quite limited" in Indian country). Tribes, on the other hand, not only have authority to regulate activities such as hunting and fishing, *Mescalero Apache Tribe*, and gambling, *Cabazon Band of Mission Indians*, even with respect to non-members, but have jurisdiction to zone property, *Brendale* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), and to tax Indian as well as non-Indian activities and property, *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

b. This division of government authority is novel and untried in Alaska. For more than a century the basic rule has been that there is *no* Indian country in Alaska, and thus no bar to the exercise of normal state jurisdiction over Native villages and lands. *See, e.g., Metlakatla Indian Community* v. *Egan*, 362 P.2d 901, 920 (Alaska 1961), *vacated on other grounds*, 369 U.S. 45 (1962); *United States* v. *Booth*, 161 F. Supp. 269 (D. Alaska 1958); *In re Sah Quah*, 31 F. 327 (D. Alaska 1886); *Kie* v. *United States*, 27 F. 351 (D. Or. 1886); *United States* v. *Seveloff*, 27 F. Cas. 1021 (D. Or. 1872); DOI Op., pp. 17-22; Report of the Governor's Task Force on Federal-State-Tribal Relations ("Governor's Report"), pp. 67-84 (Feb. 14, 1986). *See also* DOI Op. Regarding

§ 1162(a); Cohen, *supra*, at 286-287. Those states, however, still lack "general civil regulatory authority" over Indian country. *See California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 207-208 (1987).

Legal Status of Alaska Natives, 19 Pub. Lands Dec. 323, 325 (1894) ("Alaska is not Indian country"); Paul A. Matteoni, *Alaskan Native Indian Villages: The Question of Sovereign Rights*, 28 Santa Clara L. Rev. 875, 895 (1988) ("Case law has never recognized Indian country as existing in Alaska.").[8]

That understanding accords with the fact that, from the time of Russian rule, the history and treatment of Alaska Natives has always been fundamentally distinct from that of Indians in the lower 48 states. *See Egan*, 369 U.S. at 51-52; DOI Op., p. 4. Thus, for example, quite unlike the practice in the lower 48 states, there has always been "a broad application to Alaska Natives of, first, territorial law and, later, state law," Cohen, *supra*, at 763-764, which of course is flatly inconsistent with treatment of Alaska Natives as occupants of sovereign enclaves, or Indian country. *Accord Native Village of Stevens* v. *Alaska Management & Planning*, 757 P.2d at 35 (Alaska Natives are subject to state laws and taxes); Governor's Report, p. 128 ("from 1867 to the present, [Congress has presumed that] Alaska Natives

[8] Prior to this case, only one reported federal decision had recognized Indian country in Alaska. *In re McCord*, 151 F. Supp. 132 (D. Alaska 1957) (Moquawkie Indian Reserve at Tyonek). "That case has been narrowly construed and has never been followed in subsequent rulings." Matteoni, *supra*, at 896. It did, however, prompt a concerned Congress to include Alaska among the Public Law 280 states to ensure that state criminal law was not ousted from Tyonek. *See* DOI Op., p. 36. In an unpublished decision focusing on the tribal status of Chilkat Indian Village (or Klukwan), the district court observed without extended discussion that the village was Indian country. *Chilkat Indian Village* v. *Johnson*, No. J84-024 Civ. (D. Alaska Oct. 9, 1990). No court has relied upon that unpublished decision—which is entitled to little, if any, precedential weight, D. Alaska Local Rule 7.1(c); *Exxon Corp.* v. *Heinze*, 792 F. Supp. 72, 76 n.6 (D. Alaska 1992)—for the general proposition that Indian country exists in Alaska. The District Court below dismissed it, App. 76a-77a, and the Ninth Circuit did not even cite it.

living in Native villages were subject to the same civil and criminal laws as all other residents of the district, then territory, and now state of Alaska"); App. 73a-74a.

Following ANCSA, the federal and state governments have each reaffirmed the basic rule that Indian country does not exist in Alaska. *See* DOI Op., p. 132; Alaska Admin. Order No. 123 (Sept. 10, 1990); Alaska Admin. Order No. 125 (Aug. 16, 1991). In 1988—more than 15 years after ANCSA was passed—the Alaska Supreme Court did so, too. *Native Village of Stevens*, 757 P.2d at 35 ("There is not now and never has been an area of Alaska recognized as Indian country") (internal quotation marks omitted).[9] As respondents' own counsel have made clear, the Ninth Circuit decision obliterates that rule—along with the settled jurisdictional regime—by transforming virtually every Alaska Native village into Indian country, and thus displacing normal state jurisdiction in vast areas of the State. Native American Rights Fund ("NARF"), *Yes, There is Indian Country in Alaska*, 22 NARF Legal Rev. 1, 2 (Winter/Spring 1997) (Ninth Circuit "holding is not unique to Venetie and therefore, will apply to virtually all other Native villages, removing the barrier for other Alaska tribes to establish their Indian country status and jurisdiction.").

3a. This poses enormous regulatory problems for the State. For example, fish and game are vital environmental

[9] The *Stevens* court recognized as a "possible exception" the Moquawkie reserve considered in *In re McCord*. 757 P.2d at 35 & n.4. That reserve was revoked by ANCSA, however, along with the handful of other reserves that had been created in Alaska, save the Annette Island Reserve. 43 U.S.C. § 1618(a). The Annette Island Reserve, or Metlakatla, was established in 1891; it is distinct from all other Alaska Native communities in that its members are not Alaska Natives at all, but rather nineteenth century emigrants from British Columbia. As a result, Metlakatla was exempted from ANCSA. *See Atkinson* v. *Haldane*, 569 P.2d 151, 153-156 (Alaska 1977).

and economic state resources. Alaskans sought statehood in significant part to be able to regulate these resources themselves, went so far as to ensure protection for them in their constitution, Alaska const. art. VIII, § 4, and enacted a comprehensive regulatory scheme to preserve them, Alaska Stat. § 16; Alaska Admin. Code tit. 5. If ANCSA land constitutes Indian country, the State's authority to regulate hunting and fishing in vast areas of the State will be restricted and perhaps even precluded altogether. Moreover, because ANCSA land is dispersed throughout the State, and wildlife migrates without regard to jurisdictional boundaries, the Ninth Circuit ruling will prevent implementation of an effective, state-wide fish and game management scheme.[10]

The same goes for numerous other important state programs. For example, transformation of ANCSA lands into Indian country will thwart state regulation of forest practices, Alaska Stat. § 41.17, solid waste disposal, *id.* § 46.03.090, water quality, *id.* § 46.03.050, sewage treatment, *id.* § 46.03.720, and highways, *id.* § 19.10. It also opens a potentially enormous environmental compliance loophole, since state environmental controls are restricted or inapplicable in Indian country. *See Washington Dep't of Ecology* v. *EPA*, 752 F.2d 1465 (9th Cir. 1985) (state lacks jurisdiction within Indian country to impose

[10] This Court's own precedents underscore this threat. The Indian tribe in *New Mexico* v. *Mescalero Apache Tribe*, for example, had "undertaken a substantial development of the reservation's hunting and fishing resources" in order to attract tourism by arranging "package hunts" and other sporting activities. 462 U.S. at 327 & n.4. In doing so, the tribe adopted its own fish and game rules conflicting with the more stringent state regulatory scheme. *Id.* at 329. This Court held that the tribal rules preempted the state rules, even as to non-Indians. *Id.* at 344. *See also Montana* v. *United States*, 450 U.S. at 557 (tribes may bar non-members from hunting or fishing on Indian country, or "condition their entry by charging a fee or establishing bag and creel limits"). Millions of acres of ANCSA lands are prime fish and game areas.

environmental regulations). The federal Environmental Protection Agency has almost no presence in Alaska, and would be hard-pressed to regulate the hundreds of villages and vast areas comprising ANCSA lands, if existing state regulation were displaced.

b. Taxation—the particular assertion of sovereignty precipitating this action—presents additional problems. As the Ninth Circuit itself recognized, "[i]t is not unrealistic to conclude that a decision [in favor of the Village in this case] would add fuel to the engines of Native Alaskan taxation, and subject the State to a significant financial burden (as a result of paying the future levies or litigating their validity)." App. 136a. At the same time, tribal taxation will pose a significant impediment to future economic development in the State—which ANCSA was specifically designed to *promote, see* Cohen, *supra,* at 742—and, as the Ninth Circuit put it, "creates tremendous uncertainty and difficulty for the State and other businesses providing services to villages." App. 135a.[11]

Significantly, "the engines of Native Alaskan taxation" (*id.* 136a) also threaten the viability of ANCSA corporations themselves. The Village "assured [the Ninth Circuit] that tribes, as they see it, *do* have the power to tax and regulate the myriad of private corporations which received land under ANCSA." *Id.* 35a (emphasis added). As Judge Fernandez observed, that power not only would

[11] In 1986 the Native Village of Kluti Kaah—which occupies a tract of ANCSA land in south-central Alaska—claimed that it, too, occupies Indian country, and sought to tax the operator of the Trans-Alaska Pipeline, which passes near the village. Finding that the pipeline was subject to a special, federally created right-of-way, the Ninth Circuit exempted the pipeline corridor from Indian country status and rejected the village's pipeline tax. *See Alyeska Pipeline Serv. Co.* v. *Kluti Kaah Native Village,* 101 F.3d 610 (9th Cir. 1996). Under the Ninth Circuit Indian country regime, however, projects outside this discrete area would not enjoy such insulation.

give Native villages the ability "to control, regulate, and tax those corporations out of existence," but "would provide a fruitful area for *intertribal* conflict." *Id.* (emphasis added). Such efforts would—in plain derogation of ANCSA—gut the Act's hallmark corporate governance scheme, providing a graphic illustration of Chief Justice Marshall's famous maxim: "the power to tax involves the power to destroy." *McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316, 431 (1819).

c. The most immediate problem wrought by the Ninth Circuit decision is the confusion and uncertainty it creates. In the wake of that decision, for example, the authority of state officials to investigate the taking of caribou or bear on ANCSA lands is unclear; businesses do not know if they will be subject to state or tribal taxation (or both) for activities on ANCSA lands; the application of state taxes and motor vehicle laws on ANCSA lands is unclear; state officials from school teachers to health officers to law enforcement agents do not know if they can be expelled from Native villages; and the thousands of non-Natives who presently reside in such villages do not know if they are subject to tribal laws and taxes. In practically every area of government, Alaskans—Native and non-Native alike—must now ask themselves the basic question: who is in charge?

The courts will be called upon to resolve that question in the countless instances in which it arises, subjecting the boundaries and extent of state jurisdiction to exercise fundamental government powers to the continuing federal oversight and micro-management of the Ninth Circuit, sitting thousands of miles away in California—a result which Congress certainly did not intend when it sought through ANCSA to settle Native claims "rapidly, with certainty, * * * [and] without litigation." 43 U.S.C. § 1601(b). Indeed, as Judge Fernandez observed: "There are hundreds of tribes, and the litigation permutations are as vast as the capacity of fine human minds can make

them." App. 35a. The resulting "chaos" (*id.* 36a) will be exacerbated by the Ninth Circuit's indeterminate, multi-faceted balancing test for determining the existence of Indian country. Sorting all this out in the courts will be a time-consuming, financially exhausting, and socially divisive endeavor for all concerned.[12]

The extraordinary importance of this case alone warrants granting the writ. S. Ct. Rule 10(c). As we explain next, however, this case also meets the other criteria for certiorari. S. Ct. Rule 10(a).

II. THE NINTH CIRCUIT HOLDING THAT ANCSA LAND MAY CONSTITUTE INDIAN COUNTRY CONFLICTS WITH THE CLEAR INTENT OF CONGRESS IN ENACTING ANCSA, THE DECISIONS OF THE ALASKA SUPREME COURT, AND THE INTERPRETATION OF THE FEDERAL AGENCY CHARGED WITH IMPLEMENTING ANCSA.

1. Congress has plenary authority over Indian affairs. *See McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973); *Delaware Tribal Business Comm.* v. *Weeks*, 430 U.S. 73, 83-84 (1977). "Recognition or establishment of lands as Indian country," therefore, "is essentially a matter of the purpose of Congress and of

[12] According to respondents' own counsel, the Ninth Circuit ruling "will apply to virtually all other [Alaska] Native villages," altering the sovereign authority of those villages vis-a-vis the State and non-members. NARF, *supra*, at 2.

> The additional powers that tribes will have as a consequence of [the Ninth Circuit decision] include the authority to tax, zone, condemn real property, regulate land use, manage fish and game (although the extent of such authority is unclear)[,] exercise civil and criminal misdemeanor jurisdiction over tribal members, and under certain circumstances exercise civil jurisdiction over non-tribal members as well. In addition, a Tribe with "Indian country" status has the power to temporarily or even permanently expel from the community those who violate Tribal laws. [*Id.*]

the Executive Department in * * * enacting and carrying out statutes, and issuing executive orders." Cohen, *supra*, at 41. *See Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 125 (1993); Alaska Organic Act, ch. 53, § 8, 23 Stat. 24 (1884). Courts, in attempting to discern that purpose, have reached conflicting results as to whether ANCSA precludes the treatment of ANCSA lands as Indian country within § 1151(b). The executive department charged with implementing ANCSA—unlike the Ninth Circuit—has concluded that it does.

a. The four federal judges who have considered the threshold ANCSA question in this case split evenly. Both the Alaska District Court and Judge Fernandez concluded that Congress quite clearly intended to preclude designation of ANCSA lands as Indian country. *See* App. 33a-36a; 67a-71a. Numerous compelling textual indicia support that conclusion, including the Act's unequivocal declaration that it was designed to achieve its purposes "without establishing any permanent racially defined institutions" and "without creating a reservation system or lengthy wardship or trusteeship," 43 U.S.C. § 1601(b); its revocation of all Native reserves (save Metlakatla), *id.* § 1618(a); its conveyance of the land to state-chartered corporations subject to *state* law (including taxes), rather than setting it aside for tribes as such under federal superintendence, *id.* §§ 1606(d), 1607(a), 1620(d); and its extinguishment of all claims based on aboriginal title, use, or occupancy of land, *id.* § 1603(c), thus dissociating the land from any Indian country claims.[13]

[13] *See also* S. Conf. Rep. No. 581, 92d Cong., 1st Sess. 40 (1971) ("lands granted to Natives under this Act * * * are not 'in trust' and the Native villages are not Indian 'reservations' "); H.R. Conf. Rep. No. 746, 92d Cong., 1st Sess. 7 (1971) ("the conference committee does not intend that lands granted to Natives under this Act be considered 'Indian reservation' lands"); H.R. Rep. No. 523, 92d Cong., 1st Sess. 9 (1971) ("[ANCSA] does not establish

Judges Nelson and Browning, on the other hand, concluded that Congress had an entirely different regime in mind. They candidly acknowledged that "ANCSA appears to implement, in no uncertain terms, a policy of Native self-determination fundamentally at odds with the paternalistic echoes of the trust relationship." App. 24a. But—clinging to clear-statement rule upon clear-statement rule, *see id.* 14a-15a, 21a, 24a, 32a—they refused to conclude that the numerous textual indicia of Congress's intent to advance Native *self*-determination through ANCSA foreclosed judicial designation of ANCSA lands as *dependent* Indian communities, and thus Indian country, within § 1151(b). *See* App. 25a-26a.

b. But the conflict runs much deeper than this case. The Alaska state courts—like the Alaska District Court and Judge Fernandez below—have held that Congress in enacting ANCSA plainly sought to confirm rather than restrict state jurisdiction over ANCSA lands. In *Native Village of Stevens* v. *Alaska Management & Planning*, for example, the Alaska Supreme Court concluded that "[ANCSA] evidences Congress's intent that non-reservation villages be largely subject to *state* law." 757 P.2d at 41 (emphasis added).[14] That interpretation conflicts with the Ninth Circuit ruling, under which state law is rendered largely *inapplicable* within Native villages. It does, however, accord with Judge Fernandez's reading of ANCSA,

any trust relationship between the Federal government and the Natives").

[14] *See also Nenana Fuel Co.* v. *Native Village of Venetie*, 834 P.2d at 1239 ("ANCSA is * * * absolutely *inconsistent* with the concept that Alaska Native groups carry on as independent and sovereign enclaves entitled to special federal recognition") (Moore, J., concurring) (emphasis added); *id.* at 1242 (Under "ANCSA, the most far-reaching federal legislation ever to affect Alaska Natives, * * * Congress envisioned *state* regulatory authority over almost all Native-owned lands and Native corporations, and mandated involvement by the *state* in the affairs of all Native villages. Federal trusteeship and reservations were terminated.") (emphasis added).

under which, "[a]s far as the land was concerned, the regular state and federal political entities would have and retain the necessary power." App. 35a.

This conflict warrants plenary review. *See* S. Ct. Rule 10(a); *DeCoteau* v. *District County Court for Tenth Judicial Dist.*, 420 U.S. at 430-431 (certiorari granted "to resolve the conflict between the Supreme Court of South Dakota and the Court of Appeals for the Eighth Circuit as to the effect of the 1891 Act on South Dakota's * * * jurisdiction over [certain Indian lands]"). Indeed, the federal and state courts not only are split over the interpretation of an important federal statute, but their precedents now establish two entirely different jurisdictional regimes for Alaska: the Alaska Supreme Court does "not now and never has * * * recognize[d] * * * Indian country" in Alaska, *Native Village of Stevens* v. *Alaska Management & Planning*, 757 P.2d at 35; the Ninth Circuit not only does, but has earmarked tens of millions of acres of Alaska land for Indian country status. This Court should grant the writ to resolve this standoff.[15]

c. The conflict does not end there. In 1991 the Department of the Interior launched an exhaustive examination of the question whether ANCSA lands may constitute Indian country within § 1151(b). DOI Op., p. 1. Two years later—after consulting with members of Congress, state officials, and Alaska Natives, receiving comments and detailed legal briefs (including those filed by respondents in *this* case), *id.* at 3, 117-118 n.288, and probing the "history, law, and government policy toward Native

[15] The Alaska Supreme Court has made clear that it does not consider itself bound by Ninth Circuit precedent, including on questions of federal Indian law. *See In re F.P.*, 843 P.2d 1214, 1214-15 & n.1 (Alaska 1992) ("Where a federal question is involved, the courts of Alaska are not bound by the decisions of a federal court other than the United States Supreme Court") (internal quotation marks and citation omitted), *cert. denied*, 508 U.S. 950 (1993).

Alaskans," *id.* at 131—the chief legal officer of DOI issued a 133-page opinion, categorically concluding that:

> Congress clearly limited Native Village exercise of sovereign jurisdiction over [ANCSA] lands and nonmembers in a decisive fashion. *The statutory scheme established in ANCSA precludes the treatment of lands received under that Act as Indian country.* The purposes of ANCSA * * * would be frustrated by a determination that enclaves of federal and tribal jurisdiction continue to exist. [*Id.* at 131 (emphasis added).]

Coming from the federal agency charged with implementing ANCSA, 43 U.S.C. § 1624—and, indeed, with overseeing all Indian affairs, 25 U.S.C. § 2—that interpretation is entitled to "considerable deference." *Andrus* v. *Idaho*, 445 U.S. at 729. *Accord National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 417 (1992). Tellingly, the Ninth Circuit not only declined to accord the Department's interpretation any deference; it completely ignored it, even though it was argued by the State below. *See* C.A. Br. for Appellees, pp. 14, 16, 18, 43. Both the Alaska District Court and Judge Fernandez, on the other hand, recognized and relied upon that interpretation. *See* App. 33a, 69a n.32.[16]

[16] The Department's 1993 interpretation comports with its prior interpretations of ANCSA. As noted, DOI in 1978 rejected the Village's request to hold the land in trust, concluding that "in light of the clear expression of congressional intent in ANCSA *not* to create trusteeship or a reservation system, it would be an abuse of discretion for the Secretary to [do so]," DOI Op., p. 112 n.276 (emphasis added), and in 1980 rejected the Village's request for approval of an oil and gas development deal for similar reasons. *See* Letter from S. Keep, Acting Associate Solicitor, DOI, to Paul S. Williams, First Chief, Native Village of Venetie, *et al.*, p. 3 (Dec. 23, 1980). As the "contemporaneous view of the Executive Officer responsible for administering the statute," these interpretations are also "entitled to very great respect." *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 254 (1985) (internal quotation marks and citation omitted). *Accord Watt* v. *Alaska*, 451 U.S. 259, 272-273 (1981). The Ninth Circuit, however, ignored these views as well.

The direct conflict between the Ninth Circuit and DOI interpretations of ANCSA provides an alternative, independently compelling reason to grant the writ. *See Morton* v. *Ruiz*, 415 U.S. 199, 201-202 (1974) ("We granted certiorari because of the significance of the issue and because of the vigorous assertion that the judgment of the Court of Appeals was inconsistent with long-established policy of the Secretary [of DOI]"); *Patterson* v. *Lamb*, 329 U.S. 539, 541 (1947) (certiorari granted because lower court decision "upset twenty-five years of important War Department rulings and practices"). *See also Williams* v. *Lee*, 358 U.S. 217, 218 (1959) (certiorari granted because lower court decision "was a doubtful determination of the important question of state power over Indian affairs").

III. THE NINTH CIRCUIT DECISION DEEPENS THE CIRCUIT CONFLICT ON THE TEST FOR DETERMINING INDIAN COUNTRY AND CONFLICTS WITH THIS COURT'S PRECEDENTS.

1. Wholly apart from ANCSA, the Ninth Circuit decision deepens the conflict among the circuits over the test for determining Indian country within § 1151(b). This Court has said that Indian country is land "validly set apart for the use of the Indians as such, under the superintendence of the Government." *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (internal quotation marks omitted). But, as the Ninth Circuit observed below, this Court "has never resolved * * * the test for determining whether a tribe constitutes a dependent Indian community within the meaning of § 1151(b)." App. 6a. In the absence of guidance from this Court, "[c]ourts have developed * * * distinctly different tests for deciding whether a given group of Indians constitutes a dependent Indian community for the purposes of federal law." *Schaghticoke*

Indians of Kent, Conn., Inc. v. *Potter*, 587 A.2d 139, 143 (Conn. 1991) (emphasis omitted).[17]

a. This case is emblematic of the conflict and confusion that persist in the lower courts on this important issue of federal Indian law. As noted, the District Court —while focusing on this Court's federal set aside and superintendence requirements—applied a four-factor test and held that Venetie is *not* a dependent Indian community. While it agreed that "a federal set aside and federal superintendence are the dominant factors of the dependent Indian community calculus," the Ninth Circuit concluded that the District Court's test was too "restrictive." App. 9a, 12a. Applying its "more textured six-factor inquiry," the Ninth Circuit reached the *opposite* result on the *same* set of undisputed facts. *Id.* 12a, 26a n.5.

The Ninth Circuit's test is a smorgasbord of the various factors developed by the circuits. *Id.* 6a-9a.[18] As the

[17] *See also Narragansett Indian Tribe* v. *Narragansett Elec. Co.*, 89 F.3d at 917 ("Exactly what constitutes a 'dependent Indian community' * * * has not been defined"); *Pittsburg & Midway Coal Mining Co.* v. *Watchman*, 52 F.3d 1531, 1545 (10th Cir. 1995) ("the Supreme Court has never adopted its own test for determining a dependent Indian community"); *Lewis* v. *Sac & Fox Tribe of Okla. Housing Auth.*, 896 P.2d 503, 513 (Okla. 1994) (discussing the different tests applied by the federal circuits), *cert. denied*, 116 S. Ct. 476 (1995); Matteoni, *supra*, at 887 n.71 ("no precise definition for a 'dependent Indian community' exists").

[18] The Tenth Circuit initially formulated a three-factor test, *see United States* v. *Martine*, 442 F.2d 1022, 1023-24 (10th Cir. 1971); *Blatchford* v. *Sullivan*, 904 F.2d 542, 546 (10th Cir. 1990), *cert. denied*, 498 U.S. 1035 (1991), which has been adopted by the Second Circuit. *See United States* v. *Cook*, 922 F.2d 1026, 1031 (2d Cir.), *cert. denied*, 500 U.S. 941 (1991). The Eighth Circuit applies a four-factor test, *see United States* v. *South Dakota*, 665 F.2d 837, 839 (8th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982), which has been adopted by the First Circuit. *See Narragansett Indian Tribe*, 89 F.3d at 917. The Tenth Circuit recently embraced the Eighth Circuit's four-factor test, *see Pittsburg & Midway Coal Mining Co.* v. *Watchman*, 52 F.3d at 1545, even though other courts still follow the Tenth Circuit's three-factor test in *Martine*.

Ninth Circuit itself acknowledged, however, its test differs "significant[ly]" from "the test adopted by the First, Eighth, and Tenth Circuits [in] that [the Ninth Circuit] assess[es] the 'degree of federal ownership and control' over the area in question while the other circuits ask whether the United States retains 'title' to the land in question." App. 8a-9a. That conceded difference is itself largely outcome determinative in this case, since the Native Village of Venetie Tribal Government—not the federal government—holds fee title to the land at issue. *See Narragansett Indian Tribe* v. *Narragansett Elec. Co.*, 89 F.3d at 920-921 ("in most of the cases we found where land was privately held, even if by a tribe, the courts found that there was *not* a dependent Indian community") (citing Eighth and Tenth Circuit cases) (emphasis added).

The conflicting tests adopted by the lower courts have created enormous confusion on a matter of critical importance to the exercise of federal, state, and tribal sovereignty.[19] As this case illustrates, moreover, the conflicting tests may produce different results with respect to the same parcel of land, leaving the determination whether land is Indian country dependent upon the particular circuit in which it lies. The Court should grant certiorari and establish a uniform national rule for this threshold jurisdictional determination.

b. The circuits are split over even more fundamental features of the dependent Indian community test. For

[19] *See, e.g.*, William C. Canby, *American Indian Law* 99 (2d ed. 1988) ("The question of what is 'Indian country' has been even more troublesome than the question of who is an 'Indian' "); James E. Lobsenz, *"Dependent Indian Communities": A Search for a Twentieth Century Definition*, 24 Ariz. L. Rev. 1, 20-24 (1982) (existing tests "offer little guidance for recognizing 'dependent Indian communities' "); Richard W. Hughes, *Indian Law*, 18 N.M. L. Rev. 403, 459 (1988) ("courts have strained to develop from scratch various criteria for determining whether a particular community should be deemed a 'dependent Indian community,' without any consistent concept of what the term was intended to describe").

example, the Ninth Circuit decision squarely conflicts with *Narragansett Indian Tribe* v. *Narragansett Electric Co.*, in which the First Circuit adopted—verbatim—the superintendence standard applied by the Alaska District Court below, requiring "pervasive" federal involvement. 89 F.3d at 920 (quoting App. 65a).[20] Although the Indian community at issue in *Narragansett* received federal assistance and oversight, the First Circuit—like the Alaska District Court below—found the requisite superintendence lacking and thus concluded that the land was *not* Indian country within § 1151(b). 89 F.3d at 922.

The Ninth Circuit, however, expressly rejected the superintendence standard applied by the First Circuit in *Narragansett* (and by the Alaska District Court below), and, not surprisingly, reached the opposite conclusion as to the Indian country status of the land at issue. *See* App. 11a, 20a. Moreover, the Ninth Circuit based its conclusion that "Venetie has met the federal superintendence requirement of the dependent Indian community test" on the fact that it receives precisely the same type of federal assistance that the First Circuit found insufficient to establish a dependent Indian community in *Narragansett*. *Compare* App. 29a *with* 89 F.3d at 921-922.[21] *And* the Ninth Circuit even acknowledged that a different result

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[20] The Tenth Circuit applies a similar standard. *See Buzzard* v. *Oklahoma Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir.) ("Superintendency over the land requires the active involvement of the federal government."), *cert. denied*, 510 U.S. 994 (1993).

[21] In *Narragansett* the First Circuit held that the fact that the federal government "financed" the purchase of the Indian housing project, "provide[d] monies for the management of the project," and subsidized "nutrition, education and job training programs" for project members *failed* to establish federal superintendence. 89 F.3d at 918, 922. In this case, by contrast, the Ninth Circuit held that the fact that the federal government financed "a 29-unit housing project" and provided grants for the construction of similar community facilities *established* federal superintendence. App. 29a.

would obtain under the superintendence standard applied by the Alaska District Court and the First Circuit. *See* App. 28a.

The Ninth Circuit—in direct conflict with *Narragansett* and the decisions of other circuits[22]—has thus equated simple federal *assistance* with the requisite superintendence. The result is astonishing: the Ninth Circuit decision—in one fell swoop—greatly expands the dependent Indian community category of § 1151, transforming what had been a relatively minor adjunct to the traditional category of Indian reservations (§ 1151(a)) into a major form of Indian country nationwide, in direct conflict with the intent of Congress in enacting § 1151 and this Court's own precedents.[23]

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[22] *See, e.g., Narragansett*, 89 F.3d at 922 (tribe may not "obtain a valid claim to Indian country—and thus presumptive sovereignty rights—over theretofore privately-held lands just by purchasing them and obtaining financial and other assistance from the government for their development"); *Blatchford* v. *Sullivan*, 904 F.2d at 549 (no dependent Indian community where "[t]he federal government's relationship with the Yah-Ta-Hey community is not with the community qua community," but "[i]nstead, * * * with the * * * Indians who happen to live in the Yah-Ta-Hey area"); *Weddell* v. *Meierhenry*, 636 F.2d 211, 213 (8th Cir. 1980) ("it would be unwise to expand the definition of a dependent Indian community to include a locale merely because a small segment of the population consists of Indians receiving various forms of federal assistance"), *cert. denied*, 451 U.S. 941 (1981).

[23] As noted, there are about 56 million acres of Indian lands in the United States. Most of this land was "clearly designated" by Congress or the Executive "as reservations or as allotments, explicitly invoking the statutory terms." Cohen, *supra*, at 28. The Ninth Circuit decision makes 44 million acres of land—not so designated—eligible for *judicial* designation as Indian country. In doing so, it not only enlarges the dependent Indian community category of Indian country far beyond its originally intended scope, but makes the courts—not Congress or the Executive—responsible for allocating sovereign authority over vast areas of Alaska and, indeed, of the United States.

c. The dependent Indian community category of § 1151 traces its ancestry to *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913) and *United States* v. *McGowan*, 302 U.S. 535, 538 (1938). *See* 18 U.S.C. § 1151 (notes). While the Court did not define the phrase in either of those cases (and has not since), it took pains to emphasize that the Indian communities at issue were—quite unlike Venetie—basically entirely dependent on the federal government for their existence. *See* 231 U.S. at 40-45; 302 U.S. at 537 & n.5, 538-539. That conclusion was based in part on a degree of federal involvement that, as the District Court found, is absent in the wake of ANCSA.[24] It also rested on a perception—that Indians are "a simple, uninformed and inferior people," *Sandoval*, 231 U.S. at 39—which has been repudiated over time and, indeed, was disavowed by Congress in enacting ANCSA. *See* 43 U.S.C. § 1601; Lobsenz, *supra*, at 2 ("The 'quasi-sovereign' or 'dependent' status of the Indian tribe is inextricably linked to past concepts of the Indian as an uncivilized savage who was to be gradually elevated to the level of a civilized human being.").

2. On an even more elementary level, the Ninth Circuit decision conflicts with this Court's precedents establishing that jurisdictional tests should be clear, easy to apply, and capable of producing predictable results. *E.g.*, *Grubart* v. *Great Lakes Dredge & Dock Co.*, 115 S. Ct.

[24] In *McGowan* the Court emphasized that the Indian community in that case—a 28-acre colony owned by the federal government and set aside by it as a "permanent settlement" for the benefit of "needy Indians" across Nevada—"ha[d] been afforded the same protection by the government as that given Indians in other settlements known as 'reservations.'" 302 U.S. at 537. As the Court recognized in *Egan*, however, the history and treatment of Alaska Natives is fundamentally distinct from that of reservation Indians in the lower 48 states. 369 U.S. at 50-52. Moreover, ANCSA explicitly revoked the few reservations that were established in Alaska, except for Metlakatla, *see* 43 U.S.C. § 1618(a); note 9, *supra*, and Congress made clear that it did "not intend that lands granted to Natives under th[e] Act be considered 'Indian reservation' lands." H.R. Conf. Rep. No. 746, *supra*, at 7.

1043, 1055 (1995); *Sisson* v. *Ruby*, 497 U.S. 358, 364 n.2 (1990); *Burnham* v. *Superior Court of Cal.*, 495 U.S. 604, 626 (1990) (plurality opinion). As the Court recently explained in *Grubart*, multi-factor tests are "hard to apply," "jettison[] relative predictability for the open-ended rough-and-tumble of factors," and "invite[] complex argument in a trial court and a virtually inevitable appeal," all of which is especially unacceptable for threshold *jurisdictional* determinations. 115 S. Ct. at 1055. *See also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989) (discussing the theoretical and practical problems inherent in multi-factor balancing tests).

This Court recently invoked these principles in adhering to its largely "categorical" approach for determining state jurisdiction to tax within Indian country, which focuses on whether the legal incidence of the tax falls on Indians or non-Indians. *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 115 S. Ct. at 2220-21. In declining to adopt "a more venturesome approach," the Court explained that "a 'legal incidence' test * * * provide[s] a reasonably bright-line standard which, from a tax administration perspective, responds to the need for substantial certainty as to the permissible scope of state taxation authority." *Id.* at 2221 (internal quotation marks omitted). It also promotes "predictability" and "safeguards against [the] risk of litigation" turning "upon a multiplicity of factors." *Id.* (internal quotation marks omitted). *See also Seymour* v. *Superintendent*, 368 U.S. 351, 358 (1962) (rejecting Indian country test that would result in "an impractical pattern of checkerboard jurisdiction" and "recreate confusion Congress specifically sought to avoid").

The Ninth Circuit's *six*-factor balancing test for determining whether land is Indian country within § 1151(b) is precisely the sort of "open-ended rough-and-tumble of factors" this Court has rejected. *Grubart*, 115 S. Ct. at

1055. As this case illustrates, the Ninth Circuit inquiry is exceedingly difficult to apply, promotes uncertainty rather than predictability, "invit[es] complex argument in a trial court and a virtually inevitable appeal," *id.*, and is easily manipulated to achieve desired results. *See* Matteoni, *supra,* at 400 n.147 (the "Indian country criteria are easily misformulated and misapplied * * * to justify desired results"). As Judge Fernandez observed, the Ninth Circuit test is a recipe for one thing and one thing alone—"chaos." App. 36a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 96-35042

STATE OF ALASKA *ex rel.* YUKON FLATS SCHOOL DISTRICT, UNALAKLEET/NEESER CONSTRUCTION JV, UNALAKLEET NATIVE CORPORATION, NEESER CONSTRUCTION COMPANY, and GERALD NEESER,
Plaintiffs-Appellees,

v.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, a/k/a the NATIVE VILLAGE OF VENETIE, the VENETIE TAX COURT, the VENETIE TAX COMMISSION, GIDEON JAMES, LAWRENCE ROBERTS, LARRY WILLIAMS, ERNEST ERICK, LINCOLN TRITT, JOHN TITUS, and DAVID CASE,
Defendants-Appellants.

Appeal from the United States District Court
for the District of Alaska, H. Russel Holland,
District Judge, Presiding,
D.C. No. CV-87-00051-HRH

Argued and Submitted Oct. 7, 1996
Decided Nov. 20, 1996

Before: BROWNING, D. W. NELSON, and FERNANDEZ, Circuit Judges.

OPINION

D. W. NELSON, Circuit Judge:

The Native Village of Venetie Tribal Government appeals the district court's determination that the Alaska Native Claims Settlement Act extinguished Indian country in Alaska, and that the tribal government therefore lacks the authority to impose its Business Activities Tax upon a state contractor. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we reverse the district court's judgment. We conclude that the Alaska Native Claims Settlement Act did not extinguish Indian country in Alaska as a general matter, and that the land Venetie occupies is Indian country.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from Venetie's attempt to impose its Business Activities Tax upon the Neeser Construction Company, which had been hired by the State of Alaska to build a new school in the village.

The Neets'aii Gwich'in—from whom nearly all of the inhabitants of Venetie descend—are a group of Alaska Natives that has historically inhabited an area consisting of the East Fork of the Chandalar River. In 1940, the Neets'aii Gwich'in adopted a constitution under the Indian Reorganization Act, 25 U.S.C. § 476. This constitution established the Native Village of Venetie as the governing authority of the Neets'aii Gwich'in. In 1943, the Secretary of the Interior created a reservation for the Neets'aii Gwich'in out of approximately 1.8 million acres surrounding Venetie. The Native Village of Venetie has governed this reserve since its creation. In 1976, the Native Village of Venetie restructured its council to include formal representation from Arctic Village (another community comprised of Neets'aii Gwich'in) and changed its name to the Native Village of Venetie Tribal Government ("Venetie").

In 1971, Congress passed the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. § 1601 et seq. ANCSA revoked "the various reserves set aside" for Alaska Natives by legislative or executive action, including the Venetie Reservation. 43 U.S.C. § 1618(a). In exchange, Congress authorized the transfer of $962.5 million and approximately 44 million acres of land to Native village and regional corporations created by the Act. 43 U.S.C. §§ 1606, 1607, 1611. These corporations were to be owned by Native shareholders residing in the corporations' respective geographical areas.

Announcing the goals of the Act, Congress declared that

> the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, [and] without creating a reservation system or lengthy wardship or trusteeship. . . .

43 U.S.C. § 1601(b). Congress clarified that ANCSA did not "relieve, replace, or diminish any obligation of the United States or of the State or [sic] Alaska to protect and promote the rights or welfare of Natives. . . ." 43 U.S.C. § 1601(c).

Congress enabled Native village corporations to opt out of ANCSA and to receive title in fee simple to their former reservation lands. 43 U.S.C. § 1618(b). Under this option, "any Village Corporation or Corporations may elect within two years [after the enactment of ANCSA] to acquire title to . . . any reserve set aside for the use or benefit of its stockholders or members prior to December 18, 1971." *Id.* Village corporations that exercised this option were not eligible to receive land or monetary distributions from the regional corporation.

Two Native villages were recognized by ANCSA within the boundaries of the former Venetie Reservation and two Native village corporations were thus established for the Neets'aii Gwich'in: one in Venetie (the Venetie Indian Corporation), and one in Arctic Village (the Neets'aii Corporation). In 1973, the shareholders of both corporations elected to opt out of ANCSA and to take title to their former reservation lands. The United States conveyed title to the former Venetie Reservation to the Venetie Indian Corporation and the Neets'aii Corporation as tenants in common.

In 1979, the tribal membership, acting through the Venetie Indian Corporation and the Neets'aii Corporation, transferred title to the former Venetie Reservation to Venetie. The shareholders then voted to dissolve the two Native village corporations. In 1981, the State of Alaska dissolved the corporations for non-payment of fees.

In 1986, Venetie enacted a Business Activities Tax, which imposed a five percent tax on "source gains" derived from commercial activities within the village. That same year, the State of Alaska, through the Yukon Flats School District, entered into a contract with the Neeser Construction Company for the construction of a school within the Native Village of Venetie.

In 1987, Venetie filed suit in the tribal tax court to collect taxes assessed against the Neeser Construction Company in the amount of $161,203.15. The State of Alaska, as the party responsible for paying the tax, refused to defend in tribal court and brought a federal action in the District of Alaska for declaratory and injunctive relief against the Tribe. The state claimed that the Tribe lacked jurisdiction to impose the tax. The district court issued a preliminary injunction enjoining the Tribe from further enforcement proceedings. The Ninth Circuit upheld this ruling. *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384 (9th Cir.1988) (*Venetie I*). The *Venetie I* court held that the Tribe's authority to impose the tax upon non-members turned on whether Venetie is a federally recognized tribe and, if so, whether it inhabits Indian country. The court articulated a six-part test to guide the district court in its determination of the Indian country question.

On remand, the district court held that although Venetie is a tribe, it does not occupy Indian country as that term is defined by 18 U.S.C. § 1151. Applying its own four-part inquiry, the court determined that while Venetie was a dependent Indian community before 1971, Congress extinguished that status when it passed ANCSA.

Venetie's argument on appeal is in three parts. First, Venetie contends that the district court applied an unduly restrictive standard to determine whether the land at issue is Indian country. Second, Venetie argues that ANCSA did not extinguish Indian country in Alaska. Finally, Venetie asserts that it continues to occupy Indian country and therefore retains its inherent authority to tax activities occurring within its territory.

STANDARD OF REVIEW

The interpretation of a statute is a question of law reviewed de novo. *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 921 (9th Cir.), *cert. denied*, —— U.S. ——, 116 S.Ct. 337, 133 L.Ed.2d 236 (1995). The district court's factual findings are reviewed for clear error. Fed.R.Civ.P. 52(a); *United States v. American Prod. Indus., Inc.*, 58 F.3d 404, 407 (9th Cir.1995). Accordingly, the district court's determination that Venetie does not occupy Indian country as defined by 18 U.S.C. § 1151(b) is reviewed de novo, but the facts marshalled by the district court to support this determination are reviewed for clear error.

THE LEGAL STANDARD FOR DETERMINING WHETHER A TRIBE OCCUPIES INDIAN COUNTRY

The ultimate question presented by this case—whether Venetie has the authority to tax activities occurring within its territory—turns on whether Venetie occupies Indian country. *Venetie I*, 856 F.2d at 1390. To resolve this question, we must first establish the proper standard for determining whether Indian country exists in a given case.

Congress has defined Indian country as follows:

> "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all *dependent Indian communities* within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (emphasis added). This definition applies to both criminal and civil jurisdiction. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n. 5, 107 S.Ct. 1083, 1087 n. 5, 94 L.Ed.2d 244 (1987). Venetie occupies neither a reservation nor an allotment. Thus, we must establish the test for determining whether a tribe constitutes a dependent Indian community within the meaning of § 1151(b).

Although the Supreme Court has never resolved this narrow question, we do not write on a blank slate. A clear body of Court precedent emphasizes two central features of the inquiry into whether a given area constitutes Indian country, as a general matter: first, whether the territory is "validly set apart for the use of the Indians

as such," and second, whether the Natives who inhabit it are "under the superintendence of the [federal] Government." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511, 111 S.Ct. 905, 910, 112 L.Ed.2d 1112 (1991); *see United States v. John*, 437 U.S. 634, 649, 98 S.Ct. 2541, 2549, 57 L.Ed. 2d 489 (1978); *United States v. McGowan*, 302 U.S. 535, 539, 58 S.Ct. 286, 288, 82 L.Ed. 410 (1938); *United States v. Pelican*, 232 U.S. 442, 449. 34 S.Ct. 396, 399, 58 L.Ed. 676 (1914).[1]

Four circuits, including our own, have incorporated these two factors into more detailed approaches to the question of whether a Native group constitutes a dependent Indian community. Drawing upon the Eighth Circuit's decision in *United States v. South Dakota*, 665 F.2d 837 (8th Cir.1981), *cert. denied*, 459 U.S. 823, 103 S.Ct. 52, 74 L.Ed.2d 58 (1982), the First and Tenth Circuits have also adopted a multi-factored test to determine whether a tribe constitutes a dependent Indian community:

> [W]hether a particular geographical area is a dependent Indian community depends on a consideration of several factors. These include: (1) whether the United States has retained "title to the lands which it permits the Indians to occupy" and "authority to enact regulations and protective laws respecting this territory,"; (2) "the nature of the area in question, [(3)] the relationship of the inhabitants in the area to Indian tribes and to the federal government, and [(4)] the established practice of govern-

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[1] The district court noted that "it is not *land* but *Indians* which must be under the superintendence of the federal government." We agree. *Cf. John*, 437 U.S. at 649, 98 S.Ct. at 2549 ("The Mississippi lands in question here were declared by Congress to be held in trust by the Federal Government for the benefit of the Mississippi Choctaw Indians *who were at that time under federal supervision.*" (emphasis added)). The set-aside requirement adequately ensures that Indian country will not be found absent some federal connection to the land at issue.

> ment agencies toward the area,"; ([5]) whether there is "an element of cohesiveness . . . manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality;" and ([6]) "whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples."

Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531, 1545 (10th Cir.1995) (quoting *South Dakota*, 665 F.2d at 839 (citations omitted)); *see also Narragansett Indian Tribe of Rhode Island v. Narragansett Elec. Co.*, 89 F.3d 908, 97-22 (1st Cir.1996). The Second Circuit has endorsed the threefold inquiry originally outlined in *United States v. Martine*, 442 F.2d 1022, 1023 (10th Cir.1971), which consists of the three elements subsumed within the second prong of the *South Dakota* test. *See United States v. Cook*, 922 F.2d 1026, 1031 (2d Cir.), *cert. denied*, 500 U.S. 941, 111 S.Ct. 2235, 114 L.Ed.2d 477 (1991).

Relying upon *South Dakota* and *Martine*, we have suggested that an inquiry into whether a Native group qualifies as a dependent Indian community requires an analysis of six factors:

> (1) the nature of the area; (2) the relationship of the area inhabitants to Indian tribes and the federal government; and, (3) the established practice of government agencies toward that area; . . . . ([4]) the degree of federal ownership of and control over the area; ([5]) the degree of cohesiveness of the area inhabitants; and ([6]) the extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples.

Venetie I, 856 F.2d at 1391. The only significant difference between our suggested inquiry and the test adopted by the First, Eighth, and Tenth Circuits is that we assess the "degree of federal ownership and control" over the

area in question while the other circuits ask whether the United States retains "title" to the land in question.

In this case, the district court departed from our suggested six-part inquiry and carved out a new test that differs not only from *Venetie I* but from *South Dakota* and *Martine* as well. Relying primarily on *John* and *Potawatomi*, the court determined that the essential factors to be considered when assessing whether a dependent Indian community exists are whether "the Tribal Government holds land set apart for Alaska Natives as such," and whether "the Tribal Government is under the active supervision of the federal government." Indeed, the court concluded that a finding of a dependent Indian community *requires* a showing of these two factors, along with proof that the Native group in question is a tribe. The court listed two additional factors that could be considered to determine the extent, rather than the existence, of Indian country: "the nature of the area" and "the relationship of the area inhabitants to one another, to Indian tribes, and the federal government." The district court explained that the additional factors set forth in the circuit tests were "somewhat overlapping," and were subsumed in its new test.

We agree with the district court in this respect: a federal set aside and federal superintendence are the dominant factors of the dependent Indian community calculus. The most plausible reading of the caselaw supports the district court's approach. Although *John* and *Potawatomi* concerned reservation lands that would now fall under § 1151(a),[2] and *Pelican* concerned allotment land that

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[2] In both *Potawatomi* and *John*, the Supreme Court concluded that the territories in question were Indian country because they could be viewed as reservations, construed broadly, and not because they were dependent Indian communities. *John*, 437 U.S. at 648 n. 17, 98 S.Ct. at 2548 n. 17 ("Inasmuch as we find in the first category [§ 1151(a)—Reservations] a sufficient basis for the exercise of federal jurisdiction in this case, we need not consider the second and third categories [of § 1151]."); *Potawatomi*, 498

would now fall within the provisions of § 1151(c), we do not believe that courts should abandon the basic principles that have informed their analysis of Indian country for decades just because they are evaluating the status of an area that does not fit neatly into § 1151(a) or (c). Clearly, the Supreme Court has stressed the importance of an inquiry into whether tribal land was set aside by the federal government and whether the Natives who inhabit it are under the superintendence of the federal government. *See, e.g., Potawatomi,* 498 U.S. at 511, 111 S.Ct. at 910; *John,* 437 U.S. at 649, 98 S.Ct. at 2549. Indeed, in *McGowan,* a case concerning a dependent Indian community that was decided prior to the enactment of § 1151, the Court enunciated precisely these criteria. *McGowan,* 302 U.S. at 539, 58 S.Ct. at 288. Furthermore, numerous lower courts have emphasized these requirements. *See, e.g., Buzzard v. Oklahoma Tax Comm'n,* 992 F.2d 1073, 1076-77 (10th Cir.), *cert. denied,* 510 U.S. 994, 114 S.Ct. 555, 126 L.Ed.2d 456 (1993); *Blatchford v. Sullivan,* 904 F.2d 542, 548-49 (10th Cir.1990), *cert. denied,* 498 U.S. 1035, 111 S.Ct. 699, 112 L.Ed.2d 689 (1991); *Weddell v. Meierhenry,* 636 F.2d 211, 212-13 (8th Cir.1980), *cert. denied,* 451 U.S. 941, 101 S.Ct. 2024, 68 L.Ed.2d 329 (1981); *United States v. Adair,* 913 F.Supp. 1503, 1515 (E.D.Okla.1995); *United States v. Mound,* 477 F.Supp. 156, 160 (D.S.D.1979); *Youngbear v. Brewer,* 415 F.Supp. 807, 809 (N.D.Iowa 1976), *aff'd,* 549 F.2d 74 (8th Cir.1977).

Although we adopt federal set aside and superintendence as prerequisites to the existence of a dependent Indian community, we believe that these requirements should be construed broadly. This construction accords with the Supreme Court cases upon which § 1151 is based, *see* Reviser's Note, 1948 Act, 18 U.S.C.A. § 1151: *United States v. Sandoval,* 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107

U.S. at 511, 111 S.Ct. at 910 ("As in *John,* we find that this trust land is 'validly set apart' and thus qualifies as a reservation for tribal immunity purposes.").

(1913), and *McGowan,* 302 U.S. at 539, 58 S.Ct. at 288. Both cases eschewed a formalistic assessment of the status of tribal land and adopted a more functional approach to the problem of Indian country that focuses on dependence as the primary consideration. For example, in *Sandoval* the Court held that Congress possessed the power to designate lands held in fee by the Pueblo as Indian country. Congress neither had conferred the lands to the Pueblo, nor held them in trust; rather, they were held in fee under land grants from the King of Spain. Thus, *Sandoval* suggests that the fact that a tribe holds title to land in fee simple, without any restrictions on alienation imposed by the federal government, should not in itself preclude a finding that the land was "set aside" by the government. A per se refusal to construe fee land as Indian country would conflict with *Sandoval,* 231 U.S. at 48, 34 S.Ct. at 6; *see Narragansett,* 89 F.3d at 918. While *Sandoval* is not inconsistent with a general set-aside requirement, it suggests that a set aside can include land held in fee when Congress designates that land as Indian country.

Likewise, federal superintendence should be interpreted broadly. We cannot agree with the district court's requirement that federal superintendence must be "pervasive," meaning that it be the "dominant political institution" in the area as compared to the state. There is no precedent to support narrowing the federal superintendence requirement in this manner. Proof that federal superintendence is "pervasive" has never been required by the Supreme Court. To the contrary, the Court indicated in *John* that unchallenged state jurisdiction and noncontinuous federal supervision do not eliminate Indian country. 437 U.S. at 652-53, 98 S.Ct. at 2550-51; *see also Indian Country, U.S.A. v. Oklahoma Tax Comm'n,* 829 F.2d 967, 974 (10th Cir.1987), *cert. denied,* 487 U.S. 1218, 108 S.Ct. 2870, 101 L.Ed.2d 906 (1988); *South Dakota,* 665 F.2d at 842 (citing *John,* 437 U.S. at 653, 98 S.Ct. at 2551).

Having determined that a federal set aside and federal superintendence are required elements of a dependent In-

dian community, and that these requirements should be broadly construed, we must also consider whether the district court erred when it replaced the six-factor inquiry suggested by this court in *Venetie I* with its own four-part test.

The purpose of developing a multi-factored analysis is not to calcify the Indian country inquiry by erecting a complicated set of prerequisites to the establishment of a dependent Indian community. Rather, the multi-factored inquiry suggested by *Venetie I* and modified by the district court is intended to illuminate the "factually dependent" inquiry into whether those requirements have been met. *See Venetie I*, 856 F.2d at 1391. We must guide lower courts as they seek to provide meaning to the general notions of set aside and superintendence. We conclude that the functional approach to Indian country suggested by *Sandoval* and *McGowan* recommends the more textured six-factor inquiry presented by this court in *Venetie I* and adopted by three other circuits, *see Narragansett*, 89 F.3d at 917-22; *Pittsburg*, 52 F.3d at 1545; *South Dakota*, 665 F.2d at 839, over the more restrictive four-prong test advanced by the district court.

Having explained the purpose of the multi-factored inquiry, it is not surprising to find that the factors set forth in our six-part test overlap considerably. For example, the inquiry into the "practice of government agencies toward the area" (third factor in *Venetie I*) may be subsumed within the larger principle of federal superintendence. And the inquiry into the "degree of federal ownership and control" (fourth factor in *Venetie I*) falls within the set-aside inquiry. Indeed, all six factors listed in the *Venetie I* decision could be construed to fit within the two fundamental elements of a dependent Indian community. Likewise, the two additional factors that the district court chose to leave in place—"the nature of the area" and "the relationship of the area inhabitants to one another, to Indian tribes, and the federal government"—

fall under the general rubric of set aside and superintendence, respectively. Because we believe that a functional inquiry into federal set aside and superintendence is better facilitated by a consideration of a wide range of factors, we embrace the six-factor analysis that was suggested in *Venetie I* and which is virtually identical to the approach adopted by three other circuits. *See Narragansett*, 89 F.3d at 917-22; *Pittsburg*, 52 F.3d at 1545; *South Dakota*, 665 F.2d at 839.

In sum, we hold that a dependent Indian community requires a showing of federal set aside and federal superintendence. These requirements are to be construed broadly and should be informed in the particular case by a consideration of the following factors:

> (1) the nature of the area; (2) the relationship of the area inhabitants to Indian tribes and the federal government; (3) the established practice of government agencies toward that area; (4) the degree of federal ownership of and control over the area; (5) the degree of cohesiveness of the area inhabitants; and (6) the extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples.

DID ANCSA EXTINGUISH INDIAN COUNTRY IN ALASKA?

We proceed to apply this standard to discern whether the Alaska Native Claims Settlement Act extinguished Indian country in Alaska. Our analysis focuses on federal set aside and federal superintendence because they are the factors that are most relevant to an analysis of the effect of a general statute such as ANCSA. The additional factors that we have adopted above become significant when analyzing whether a specific parcel of land qualifies as Indian country. For example, the cohesiveness of the community and the nature of the area at issue

become intelligible factors only once the level of inquiry moves from general statutory provisions to specific territorial claims. Accordingly, the following analysis of ANCSA focuses on set aside and superintendence generally. When we proceed to answer the ultimate question of whether Venetie occupies Indian country, we will illuminate this general inquiry by considering the additional factors of our six-part test.

A. *Canons of Construction*

We begin by emphasizing the fundamental principle that statutes affecting Indian rights "are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78, 89, 39 S.Ct. 40, 42, 63 L.Ed. 138 (1918); *see also Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1257 (9th Cir.1994); *McNabb v. Bowen*, 829 F.2d 787, 792 (9th Cir.1987). This canon of construction derives from the trust relationship that exists between the federal government and Native Americans. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831). "Since Congress is exercising a trust responsibility when dealing with Indians, courts presume that Congress' intent toward them is benevolent and have developed canons of construction that treaties and other federal action should when possible be read as protecting Indian rights and in a manner favorable to Indians." Felix S. Cohen, *Handbook of Federal Indian Law* 221 (1982 ed.). Among these canons is the rule that Congress's intent to abrogate Indian rights must be indicated by a "clear and plain statement." *See id.* at 224.

ANCSA falls into that category of statutes enacted for the benefit of Indians. Therefore, it should be liberally construed, and "doubtful expressions [should be] resolved in favor of the Indians." *Alaska Pacific Fisheries*, 248 U.S. at 89, 39 S.Ct. at 42. Specifically, congressional

intent to extinguish Indian country must be reflected by "clear and plain" language. *United States v. Sante Fe Pac. R.R. Co.*, 314 U.S. 339, 353, 62 S.Ct. 248, 255, 86 L.Ed. 260 (1941). It is with this background principle in mind that we consider the effect of ANCSA.

B. *Federal Set Aside*

There is no question that Congress set aside land for specific Native entities when it enacted ANCSA. The only question is whether Congress set aside ANCSA land for Alaska Natives, as such. We believe that the village corporations established under ANCSA, while business entities, maintain a distinctly Native identity. Accordingly, we conclude that land set aside for such corporations qualifies as land set aside for Alaska Natives, as such.

The district court determined that the corporate model of Native land ownership established under ANCSA precluded a finding that the federal government had set aside the land at issue for the use of Alaska Natives. The court concluded that the corporate model of land ownership dictated by the Act evinced a congressional intent to treat Alaska Natives as ordinary business entities—not Natives, "as such."

We disagree. First, the corporations established under ANCSA differ markedly from ordinary business corporations. Natives own and manage the corporations. Under the original statute, membership in the corporations was restricted to Natives for 20 years, 43 U.S.C. § 1606(h)(1), and the 1987 Amendments allow each corporation to extend this restriction indefinitely. Alaska Native Claims Settlement Act Amendments of 1987, Pub.L. No. 100-241 (1987) (codified at 43 U.S.C. § 1629c). In addition, the Act provides for each village corporation to be comprised of Natives from a particular Native village, each an existing Native political and cultural entity. 43 U.S.C.

§ 1607(a). Indeed, under the Act each village corporation gained at a minimum the surface estate to the very land on which the particular Native village was situated. 43 U.S.C. § 1611(a)(1) (conferring on each local corporation the right to select "all of the township or townships in which any part of the village is located, plus an area that will make the total selection equal to the acreage to which the village is entitled"). Accordingly, the land grants under the Act were far different from mere distributions made to business entities on the basis of monetary value. Rather, they were informed by Natives' historical ties to the lands they inhabit.

Second, the statute suggests that the local corporations are the instruments of, and owe obligations to, the Native villages. The Act defines each village corporation as charged with the responsibility of managing assets "for and on behalf of a Native village. . . ." 43 U.S.C. § 1602(j).

Third, the significant protections of Native land offered by ANCSA and its amendments indicate the extraordinary character of these "business" corporations. Under the original version of the Act, the corporations enjoyed nearly a complete exemption from the requirements of the federal securities laws until 1991, 43 U.S.C. § 1625 (original version of statute), as well as immunity from state and local property taxes on undeveloped land, 43 U.S.C. § 1620 (original version of statute). The 1987 Amendments enabled the corporations to extend the former exemption. Pub.L. No. 100-241 (1987) (codified at 43 U.S.C. § 1625).

The Alaska National Interest Lands Conservation Act ("ANILCA"), Pub.L. No. 96-487 (1980) (codified at 16 U.S.C. §§ 3101-3233, 43 U.S.C. §§ 1606, 1631-41), has provided further protections to Native land. ANILCA permitted Native corporations to place their undeveloped lands in a "land bank," which entitles them to tax benefits, 43 U.S.C. § 1636. Specifically, in exchange for placing a moratorium on development and sale of the "banked" land, and agreeing to manage the land in accordance with federal requirements, the corporations qualify for federal and state property tax immunity. 43 U.S.C. § 1636.[a]

Finally, the restrictions on Native corporation stock provided by ANCSA indicate the special character of these corporations. At the election of the corporation, its stock may not be alienated, 43 U.S.C. § 1606(h)(1)(B)(vi), and voting rights may be limited to Native stockholders, 43 U.S.C. §§ 1606(h)(2)(C). Even where the corporation elects to lift restrictions on alienation, it may still restrict voting rights to Native stockholders. 43 U.S.C. § 1606(h)(3)(D)(i). Native corporations may also amend their bylaws to give the corporation the right to buy any stock offered for sale by a stockholder, 43 U.S.C. § 1606(h)(3)(D)(ii), and the right of first refusal on any shares transferred to a non-Native pursuant to intestate succession, 43 U.S.C. § 1606(h)(2)(B).

In reaching its conclusion that ANCSA lands were not set aside for Alaska Natives as such, the district court also emphasized ANCSA's provision for Native ownership of land in fee. It is true that in spite of the protections described above, the lands selected by the Natives under ANCSA are freely alienable, unless the Natives elect to seek the shelter of the ANILCA "land bank."

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[a] The fact that all private landowners, and not just Native corporations, are eligible for benefits under ANILCA is not significant. Only private owners of land adjacent to or directly affecting federal or state lands are eligible. 43 U.S.C. § 1636(a)(1). Even more important, Native corporations receive greater benefits than other landowners—only Native corporations are entitled to tax immunity, 43 U.S.C. § 1636(c)(2). These protections not only evince a congressional intent to preserve a protective relationship with Alaska Natives, one which continues a policy of federal superintendence, *see infra*, but they also suggest that Congress meant to "set aside" the land specifically for the use of Natives, as such.

But the mere fact that Alaska Natives hold title to the land in fee does not preclude a finding that Congress set aside the lands for their use and occupancy. Refusal to treat a Native group as a dependent Indian community simply because it owned land in fee would conflict with one of the seminal cases on the subject, *Sandoval*, 231 U.S. at 48, 34 S.Ct. at 6. Such a rule would also violate principles articulated by the Supreme Court in another early Indian country case, *United States v. Chavez*, 290 U.S. 357, 364, 54 S.Ct. 217, 220, 78 L.Ed. 360 (1933). There, the Court stated that Indian country includes "*any* unceded lands *owned* or occupied by an Indian nation or tribe." *Id.* (emphasis added).

The Tenth Circuit has considered several cases raising this issue and has concluded that mere fee ownership does not prevent Native-owned land from qualifying as Indian country. In *Indian Country, U.S.A.*, 829 F.2d at 973, the Tenth Circuit held that land owned by the Creek Nation is Indian country, even though it is neither on a reservation nor on land held in trust by the federal government. The court concluded that "it would be anomalous to adopt the State's position suggesting that the treaties conferring upon the Creek Nation a title *stronger* than the right of occupancy have left the tribal land base with *less* protection, simply because fee title is not formally held by the United States in trust for the tribe." *Id.* at 975-76. The First Circuit has drawn a similar conclusion. *Narragansett*, 89 F.3d at 918.

These cases suggest that the purpose of the set-aside requirement is to ensure that Native groups do not unilaterally claim rights over Indian country by requiring that Congress at least recognize or designate the land at issue for Native use. On these grounds, the argument that the government set aside the land is stronger in this case than it is in either *Sandoval* or *Martine*, where the Tribes acquired fee title from entities other than the government. Here, Congress specifically has conferred the land at issue on the Natives by statute. We hold that this satisfies the set-aside requirement.

C. *Federal Superintendence*

The superintendence requirement of the dependent Indian community test is designed to determine the extent to which the traditional trust relationship between the federal government and Native Americans remains intact in a particular case. There is no hard and fast rule for determining how involved the trust relationship must be to constitute the requisite level of superintendence.

Before the passage of ANCSA, Alaska Natives were thought to be under the guardianship of the United States and were entitled to the benefits of this special relationship. *See Alaska Pacific Fisheries Co.*, 248 U.S. at 88, 39 S.Ct. at 41; *Pence v. Kleppe*, 529 F.2d 135, 138 n. 5 (9th Cir.1976); Cohen, *supra*, at 739. We believe that this trust relationship survived the passage of ANCSA. This circuit "appears to recognize a federal trust responsibility comparable to that toward other Indians, even after passage of the Alaska Native Claims Settlement Act." William Canby, *American Indian Law* 274-75 (2d ed. 1988) (citing *Alaska Chapter, Associated General Contractors v. Pierce*, 694 F.2d 1162, 1168-69 n. 10 (9th Cir.1982)).

The district court found that ANCSA "effected a significant change in relationship as between the federal government and Alaska Natives." The court emphasized that the corporate model introduced by ANCSA constituted "a significant diminution of the power of Congress and the Executive agencies over Alaska Native tribes," and that Congress's policy in enacting ANCSA "strongly suggests a shift from government superintendence to self regulation." The district court concluded that "[t]he federal government no longer exercises that level of *active*

superintendence necessary to evidence an intent to be the *dominant* political institution in the area in question to the exclusion of the state."

As a threshold matter, we reject the notion that federal supervision must be "dominant" in order to satisfy the superintendence prong of the Indian country test. This "dominant" standard appears to have been determinative in the district court: the court relied on the introduction of state control over Native corporations to support its conclusion that federal superintendence had been displaced by ANCSA. But the introduction of state supervision over certain aspects of Indian life does not eviscerate Indian country. "[A]t times Congress has retained Indian country status but has delegated partial jurisdiction to states over areas of Indian country or over specific legal subjects." Cohen, *supra*, at 361. An example of such congressional action is Public Law 280, which grants certain states extensive criminal and civil jurisdiction over Indian country. *See* 18 U.S.C. § 1162 (criminal jurisdiction); 28 U.S.C. § 1360 (civil jurisdiction). Although this law "radically shifts the balance of jurisdictional power toward the states and away from the federal government . . . . [it does not] terminate the trust relationship between the tribes and the federal government." Canby, *supra*, at 176. Courts have determined that tribal jurisdiction—and thus Indian country—exists in states to which Public Law 280 applies. *See Bryan v. Itasca County*, 426 U.S. 373, 388-89, 96 S.Ct. 2102, 2110-11, 48 L.Ed.2d 710 (1976); *see also* David Case, *Alaska Natives and American Laws* 439 (1984) ("[E]ven P.L. 280 does not deprive a tribe of continuing (although concurrent) tribal jurisdiction"). This analysis indicates that the litmus test of federal superintendence is whether the federal government has abandoned its trust responsibilities, rather than whether the state government has been injected into tribal affairs.

Any law terminating the federal trust relationship with a Native tribe or organization must do so clearly and explicitly. Cohen, *supra*, at 224. ANCSA contains no such statement; in fact, it is clear that it did not extinguish federal superintendence of Alaska Natives. Therefore, the federal government continues to execute its trust responsibilities toward Alaska Natives.

First, the plain language and legislative history of the statute evince Congress's intent to maintain federal superintendence over Alaska Natives. While the Act promotes Native autonomy and disavows any "lengthy wardship or trusteeship," 43 U.S.C. § 1601(b), Congress declared that ANCSA did not "relieve, replace, or diminish any obligation of the United States or of the State or [sic] Alaska to protect and promote the rights or welfare of Natives. . . ." 43 U.S.C. § 1601(c). Additionally, Congress rejected an earlier version of the bill that would have transferred federal responsibilities for Alaska Natives to state authorities. *See* Alaska Native Claims Settlement Act of 1970, S. 1830, 91st Cong., 2d Sess. at § 4(b)(1) (1970).

Second, ANCSA neither prohibits nor discontinues the provision of federal services to Alaska Natives. Payments made under the Act do not "substitute for any governmental programs otherwise available to the Native people of Alaska. . . ." 43 U.S.C. § 1626(a). Indeed, Alaska Natives remain eligible for federal benefit programs after ANCSA:

> ANCSA did not end federal benefits and protections for Alaska Natives; it concerned only their lands and land-related claims. Natives in Alaska continue to be eligible for and receive assistance under federal programs available to Indians throughout the United States. All major Indian legislation since ANCSA specifically has included Alaska Natives or their villages or corporations.

Cohen, *supra*, at 766. Examples of such major legislation include the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450b(e), the Indian Health Care Improvement Act, 25 U.S.C. §§ 1603(c)–1603(d), the Tribally Controlled Community College Assistance Act, 25 U.S.C. § 1801(2), and the Indian Child Welfare Act, 25 U.S.C. §§ 1903(3), 1903(8).[4] Taken together, this patchwork of benefit programs demonstrates a continuing intent by Congress to maintain federal superintendence over Alaska Natives.

Third, the fact that ANCSA transferred title to settlement lands to corporate entities does not appear to have extinguished federal superintendence over Alaska Natives. The House Report accompanying ANCSA suggests that

[4] The State of Alaska has identified four acts of Congress that do not specifically define Alaska Native corporations as "Indians" or ANCSA land as "Indian land." In fact, only the Indian Gaming Regulation Act, 25 U.S.C. § 2701 et seq., defines "Indian lands" in a way that may not encompass ANCSA lands, *see* 25 U.S.C. § 2703(4)(B), and only the Indian Land Consolidation Act, 25 U.S.C. § 2201 et seq., defines "tribe" in a way that may not include Alaska Native corporations, *see* 25 U.S.C. § 2201(1). The Indian Law Enforcement Reform Act, 25 U.S.C. § 2801 et seq., adopts the definition of "Indian country" set forth in 18 U.S.C. § 1151—the very statute that we interpret today to contemplate Alaska Natives as dependent Indian communities. *See* 25 U.S.C. § 2801(4). The only other statute to which the State of Alaska cites can be read to *support* the notion that Congress continues to exercise superintendence over Alaska Natives. The National Indian Forest Resources Management Act, 25 U.S.C. § 3101 et seq., establishes an Alaska Native technical assistance program designed to promote the sustained yield management of Indian forest services. *See* 25 U.S.C. § 3112(a). The federal government provides this support directly to ANCSA corporations, implicitly recognizing the essentially Native character of such corporations.

Even if we were to read these four statutes as suggesting a disconnect between ANCSA corporations and Alaska Natives, we are not persuaded that they overcome the evidence of continuing federal superintendence over Alaska Natives that is contained in the major legislative initiatives affecting Indians.

the Act significantly diminishes federal supervision over Native corporations: "The regional corporations and the village corporations will be organized under State law, and will not be subject to Federal supervision except to the limited extent specifically provided in the bill." H.R. Rep. No. 523, 92d Cong., 1st Sess., *reprinted in* 1971 U.S.C.C.A.N. 2192, 2199. However, subsequent legislative action belies this intention and indicates that Congress continues to exercise federal superintendence over Native corporations. "Since the enactment of ANCSA, Congress has not excluded Alaska Natives from any programs available to other Native Americans and, indeed, specifically has included Alaska Natives, villages, *and corporations* among those eligible for programs under all new major Indian legislation." Cohen, *supra*, at 769 (emphasis added).

Furthermore, the Native corporations themselves are subject to federal controls that have not been imposed upon the general corporate community. Corporate articles and stock ownership are regulated by the federal government. *See, e.g.*, 43 U.S.C. § 1606(e) (requiring that Secretary of Interior must approve Native corporations' articles of incorporation and bylaws and that such articles and bylaws may not be amended for five years without Secretary's approval); 43 U.S.C. § 1606(h)(1)(B) (providing that stock in Native corporations is inalienable at corporations' election); 43 U.S.C § 1606(h)(2)(C) (providing that only Natives may own voting shares of stock); 43 U.S.C. § 1606(h)(2)(B) (granting Native regional corporations right of first refusal to shares transferred to a non-Native pursuant to intestate succession); 43 U.S.C. § 1606(h)(3)(D)(i) (corporation may amend its bylaws to give corporation the right to buy any stock offered for sale by a stockholder). Additionally, Native corporations may place their land in a "land bank," which entitles the corporation to various tax benefits. 43 U.S.C. § 1636.

Congress did provide Native corporations with the power to opt out of these supervisory controls, *see* 43 U.S.C. § 1629c(b) (alienability restrictions continue in perpetuity unless rescinded by Native corporation), and the decision to place land in a "land bank" is at the corporations' discretion. 43 U.S.C. § 1636. But these provisions do not indicate a clear congressional intent to *terminate* federal superintendence over Native corporations. Instead, when viewed in conjunction with the federal assistance provided to the members of these corporations, these provisions at most reflect the general ambiguity of ANCSA's effect on claims of Indian country in Alaska. This ambiguity has been recognized by Congress: "No provision of this Act (the Alaska Native Claims Settlement Act Amendments of 1987) . . . or change made by . . . this Act in the status of land shall be construed to validate or invalidate or in any way affect . . . any assertion that Indian country . . . exists or does not exist within the boundaries of the State of Alaska." Pub.L. No. 100-241 § 17(a)(2) (1988), 101 Stat. 1814. Because statutes affecting Indian rights "are to be liberally construed, doubtful expressions being resolved in favor of the Indians," *Alaska Pacific Fisheries,* 248 U.S. at 89, 39 S.Ct. at 42, we conclude that the transfer of title to Native corporations—and not to tribes—does not extinguish federal superintendence over the Alaska Natives who comprise those corporations.

Perhaps the strongest objection to this conclusion is that ANCSA appears to implement, in no uncertain terms, a policy of Native self-determination that is fundamentally at odds with the paternalistic echoes of the trust relationship. As noted above, ANCSA promotes Native autonomy and disavows any "lengthy wardship or trusteeship." 43 U.S.C. § 1601(b). How can this intent be reconciled with a continuing design to exercise federal superintendence over Alaska Natives?

The answer is found in the unique relationship that Native Americans share with the federal government. On July 8, 1970, President Nixon enunciated a federal policy toward Indians that continues to this day: self-determination without termination of the trust relationship. The President "called for rejection of the extremes of termination and paternalism: termination because it ignored the moral and legal obligations involved in the special relationship between tribes and the federal government, and paternalism because it resulted in 'the erosion of Indian initiative and morale.'" Cohen, *supra,* at 186 (quoting Richard M. Nixon, *Special Message to the Congress on Indian Affairs* (July 8, 1970)). The reconciliation of self-determination and superintendence is reflected in the Indian Self-Determination and Education Assistance Act of 1975, where Congress declared its commitment.

> to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

25 U.S.C. § 450a(b). The federal government is fulfilling, not abandoning, its trust responsibilities when it facilitates Indian self-determination. Moreover, as expressed by the Self-Determination Act, Indian self-determination involves increased participation of Native Americans in the administration of federal programs, not the elimination of those programs nor the removal of federal officials from a supervisory role over those programs.

We believe that ANCSA also implemented the federal policy of self-determination without termination of the

trust relationship. Accordingly, we find that Native self-determination and ongoing federal superintendence may coexist, and that this is precisely the federal-tribal relationship that was introduced by ANCSA.

In sum, we hold that ANCSA neither eliminated a federal set aside for Alaska Natives, as such, nor terminated federal superintendence over Alaska Natives. As a result, Indian country still may exist in Alaska.

DOES VENETIE OCCUPY INDIAN COUNTRY?

Having determined that ANCSA does not extinguish Indian country in Alaska, we must ask: Is Venetie a dependent Indian community? The district court found that prior to ANCSA, the Venetie Reservation had been set aside for the Neets'aii Gwich'in as Alaska Natives, and its inhabitants were subject to the active superintendence of the federal government. Its conclusion that Venetie no longer constitutes a dependent Indian community rests on the changes effected by ANCSA.

We have determined that ANCSA does not extinguish Indian country in Alaska as a general matter. This conclusion changes the import of the district court's factual findings; when we accord a broad interpretation to set aside and superintendence, the district court's factual findings actually support the determination that the land owned by Venetie is Indian country. We proceed to illustrate this point by examining the relevant factors of our six-pronged inquiry, mindful of the overarching prerequisites to a dependent Indian community—set aside and superintendence.[5]

[5] The factual predicate for the following discussion is drawn from the district court's tribal status and Indian country opinions in this case. The district court's factual findings are not clearly erroneous, and we accept them without objection. Our difference with the district court concerns the legal significance of these factual findings.

A. *The Nature of the Area*

Venetie owns the former Venetie Reservation, an area of 1.8 million acres that is the heart of the land traditionally used by the Neets'aii Gwich'in. This land is isolated and undeveloped; it is not accessible by surface roads or railroads. We accept the district court's conclusion that "the Neets'aii Gwich'in have, since before the appearance of non-natives, inhabited a reasonably well-defined territory to the virtual exclusion of other people; and in modern times have occupied much of that same territory, in the form of the Venetie Reservation. They still occupy this same land."[6] The district court also found that the land owned by Venetie is well suited to the Tribe's subsistence lifestyle. These determinations support the conclusion that Venetie has a special "use and occupancy" relationship to the land at issue.

B. *The Relationship of the Area Inhabitants to Indian Tribes and the Federal Government*

Venetie is home to the Neets'aii Gwich'in, and its inhabitants are, almost exclusively, members of that Tribe. The near-perfect correlation between area inhabitants and tribal membership indicates the strong ties between the land, its people, and the Tribe.

The area inhabitants are similarly bound to the federal government. Venetie has enjoyed a long history of interaction with federal officials. Since the early part of this century, the Bureau of Indian Affairs has been involved in the administration of educational and health services in Venetie. The BIA operated a school at Arctic Village until 1970 and at Venetie until 1984. Venetie obtained one of the first approved constitutions under the Indian

[6] This conclusion is contained in the district court's tribal status decision in the Venetie case, in which the court held that Venetie qualifies as an Indian tribe. This holding is not challenged on appeal.

Reorganization Act. The district court acknowledged that the inhabitants of Venetie maintain "significant contacts and relationships" with numerous federal agencies. And as the district court recognized, the fact that the Tribe has established ties to the State of Alaska "is not inconsistent with a finding of Indian Country if all of the elements of such are proven." *See John*, 437 U.S. at 652 n. 23, 98 S.Ct. at 2550 n. 23 ("[T]he provision of state services to Indians would not prove that the Federal Government ha[s] relinquished its ability to provide for these Indians under its Article I power.").

C. *The Established Practice of Government Agencies Toward the Area*

Despite the longstanding relationship between Venetie and the federal government and the continuing interaction between the Tribe and federal agencies, the district court found that the federal government's role in providing various services to the area had diminished in two principal respects. First, "federal largess is now available in the form of grants and other programs which are administered by Native people themselves with general oversight by agencies as opposed to direct agency services to the tribe." Second, the State of Alaska has played a more pervasive role in providing these services.

Undoubtedly, the practice of federal agencies toward Venetie has changed since ANCSA was enacted in 1971. In many respects, the federal government has been replaced by either the State or the Tribe itself as the direct provider of services. If the litmus test of federal superintendence was that such superintendence be "pervasive," meaning that it be the "dominant political institution" in the area as compared to the state, the diminished federal role would undermine the conclusion that federal superintendence over Venetie continues today. But "dominance" is not the proper benchmark of superintendence. As explained *supra*, the litmus test of federal superintendence is whether the federal government has abandoned its trust responsibilities, not whether the state government has been injected into tribal affairs.

On the record before us, it is clear that the federal government continues to be involved in the affairs of the Neets'aii Gwich'in. For example, as noted by the district court, "[f]ederal grants have been approved for an airport at Arctic Village, a 29-unit housing project at Venetie, water and wastewater systems at Arctic Village and Venetie, housing renovation at Venetie, and a self-governance project. There were other similar federal grants as well." This supports a finding that Venetie has met the federal superintendence requirement of the dependent Indian community test.

D. *The Degree of Federal Ownership of and Control over the Area*

ANCSA terminated federal ownership of the Venetie Reservation. Today, Venetie owns its land in fee simple, and the federal government exercises few controls (if any) over Venetie's territory. As noted above, however, tribal ownership of land in fee does not defeat a finding of Indian country. *Cf. Sandoval*, 231 U.S. at 48, 34 S.Ct. at 6; *Narragansett*, 89 F.3d at 918. It does mean that the Tribe must produce alternative evidence of federal superintendence over Native affairs in the territory. Based on our findings in subsections B and C, *supra*, we conclude that the Tribe has met this burden.

E. *The Degree of Cohesiveness of the Area Inhabitants*

The high degree of cohesiveness among the inhabitants of Venetie is uncontested. We have no reason to depart from the district court's finding that

> the Neets'aii Gwich'in are a cohesive community. All but a few residents of the area (notably school teachers) are Alaska Natives and members of the

tribe. They have at all times relevant to this case, right down to the present, voluntarily come together for purposes of forming their own traditional councils which have provided for the protection and welfare of the whole community.

F. *The Extent to Which the Area Was Set Aside for the Use, Occupancy, and Protection of Dependent Indian Peoples*

The district court correctly acknowledged that when the Neets'aii Gwich'in obtained a reservation in 1943, "this land was set aside for [them] as a Native people." The district court concluded, however, that the land at issue is no longer set aside for the use and occupancy of Alaska Natives, as such. This conclusion was based upon ANCSA's extinguishment of the Venetie Reservation and the Act's transfer of land not to the Neets'aii Gwich'in Tribe but to a corporate entity. As indicated in our general discussion of ANCSA's impact upon the federal set aside requirement, *supra,* we disagree with this conclusion. We believe that the village corporations established under ANCSA, while business entities, maintain a distinctly Native identity. Accordingly, we conclude that land set aside for such corporations qualifies as land set aside for the use, occupancy, and protection of Alaska Natives, as such.

Venetie presents an especially compelling illustration of this conclusion. Section 1618(b) of ANCSA permits a village corporation to acquire title to "any reserve set aside for the use or benefit of its stockholders or members prior to December 18, 1971." In exchange, the village corporation forfeits any claim to land or funds distributed by the regional corporation under ANCSA. When the members of the Venetie and Arctic Village corporations voted to exercise their rights under § 1618(b), they received a parcel of land that mapped the former reservation of their common Tribe—the Neets'aii Gwich'in.

Title to this former reserve was subsequently transferred to Venetie, effecting the result made possible by § 1618(b): reunification of the Tribe and its reserve land.

We believe that this result strengthens the conclusion that a federal set aside for the use and occupancy of the Neets'aii Gwich'in, as such, has been maintained. Section 1618(b) may use the general corporate form of ANCSA, but its underlying purpose is to permit Alaska Natives to retain the historic connection between tribes and their lands. Corporations may be the vehicle through which this goal is accomplished under § 1618(b), but this section defines eligible land according to the pre-ANCSA claims of corporation *members.* The reunification of Venetie with its former reservation land demonstrates that the land has been set aside for Indians, *as such*—an assertion that is somewhat less straightforward where Native corporation land does not share such a close association with former tribal land.

The foregoing application of our six-factor inquiry indicates that Venetie meets the set-aside and superintendence requirements of the dependent Indian community test. Although the federal government no longer owns or controls the former Venetie Reservation, every other factor of our inquiry supports the conclusion that Venetie occupies Indian country: Venetie has a special "use and occupancy" relationship to its land; the inhabitants of Venetie maintain "significant contacts and relationships" with numerous federal agencies; the federal government continues to be involved in the affairs of the Neets'aii Gwich'in; the high degree of cohesiveness among its inhabitants indicates that Venetie is a strong and distinct Native community; and the reunification of Venetie with its former reservation land via a statutory mechanism provided by Congress demonstrates that the land has been set aside for Indians, *as such.* We therefore conclude that Venetie is a dependent Indian community and that, accordingly, its territory qualifies as Indian country.

CONCLUSION

This nation has a special relationship with and responsibility toward Native American citizens. The Alaska Native Claims Settlement Act is a unique and innovative attempt to meet that responsibility. It marks a genuine endeavor to facilitate Native self-determination by providing for the direct involvement of Alaska Natives in the management of their affairs. This policy of self-determination fulfills the special relationship between Alaska Natives and the federal government; it does not terminate that relationship. Absent a clear and unequivocal expression by Congress, we will not imply that such termination has occurred.

ANCSA does not contain a definitive statement expressing its effect upon Indian country in Alaska. In fact, various elements of ANCSA indicate that a federal set aside was conveyed by the Act and that federal superintendence of Alaska Natives was preserved under the Act. Accordingly, we hold that ANCSA did not extinguish Indian country in Alaska, and that Venetie, having demonstrated that it qualifies as a dependent Indian community, occupies its territory as Indian country.

The judgment of the district court is REVERSED and this case is REMANDED to the district court to determine whether Venetie has the power to impose a tax upon a private party where the State of Alaska will ultimately pay the obligation.[7]

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[7] In *Venetie I*, Venetie argued that sovereign immunity shielded it from suit and that, in the alternative, the tribal abstention doctrine precluded the federal court from hearing Alaska's claim until it was adjudicated in tribal court. The *Venetie I* court declined to reach either argument on the ground that both contentions depended upon a preliminary finding that Venetie was a tribe.

On remand, the district court held that Venetie is in fact a tribe. However, Venetie asserts neither sovereign immunity nor the tribal abstention doctrine on this appeal.

FERNANDEZ, Circuit Judge, concurring:

Because judges are historically minded and experts at analogical reasoning, it is very tempting to treat ANCSA as just another statute to be adjudged as if it were a mere continuation of prior Indian policy. A continuation, that is, if that policy can really be called continuous. But ANCSA was intended to be and was something very different. It attempted to preserve Indian tribes, but simultaneously attempted to sever them from the land; it attempted to leave them as sovereign entities for some purposes, but as sovereigns without territorial reach. Thus, the land and the vast sums of money made available did not go to the tribes. It went into mere private corporations.

Those corporations were to be separate from the tribes, could sell land, and could even be taxable eventually, although the land could also be placed in tax-free preserves, just as anyone else's land can be under proper circumstances. The tribes were no longer land based; they were member based. In short, Congress wanted to provide for "maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges . . ." in Alaska. 43 U.S.C. § 1601(b). The tribes would continue as sovereigns, but there would be no more Indian country because the land would not be set aside by the United States "for the use of the Indians as such." *United States v. Pelican*, 232 U.S. 442, 449, 34 S.Ct. 396, 399, 58 L.Ed. 676 (1914). Nor would it remain "under the superintendence of the government." *Id.; see also Op. Sol. Gen. of Dep't of Interior*, M-36975, 131-33 (Jan. 11, 1993).

Let me put it a slightly different way. The reason that the old Indian country test will not work is that Con-

gress's new conception was to maintain tribal sovereignty and to maintain a federal interest in and protection of Indians and tribes, but to separate the land, and an almost billion-dollar fund, from the tribes themselves. That left a potent resource in the hands of the Indian peoples. It also left tribal sovereignty intact, but it simultaneously precluded that sovereignty from being reified in the form of control over land.

In so doing, Congress disassociated the land from all other claims, including Indian country claims. It did so explicitly when it extinguished all claims "based on claims of aboriginal right, title, use, or occupancy of land . . . or . . . based on any statute or treaty. . . ." 43 U.S.C. § 1603(c). The very idea of Indian country is, of course, a notion incorporated into a statute. *See* 43 U.S.C. § 1151. Moreover, the assertion of § 1151 sovereignty over territory is a claim which is necessarily based upon aboriginal title, statute, or treaty. Both were abolished. As we have previously recognized, the provenance of ANCSA was unique, so even the old rule of construction of statutes in favor of Indians "operates with less force." *United States v. Atlantic Richfield Co.*, 612 F.2d 1132, 1139 (9th Cir.1980). That uniqueness is why the old tests just do not work.

Of course, the land deeded to the private corporations was for the benefit of their Indian stockholders, just as the money was for their benefit. Of course, those same Indian stockholders tended to be members of tribes, though they did not need to be. Of course, the government retained its interest in the tribes, as such, and in the Indian peoples themselves. Perhaps not every group could show cohesiveness, but it certainly is true that the land was set aside for Indian peoples *ab initio*, although in no sense was most of it for their exclusive use, occupancy, or protection any more than land owned by any other corporate entity is for the use, occupancy, or protection of its members. But

all of that is really rather irrelevant under the new regime. If ANCSA meant anything at all, it meant that the tribes, as such, would no longer have control or sovereign power over the land. They would only have sovereignty over their members. As far as the land was concerned, the regular state and federal political entities would have and retain the necessary power. In short, it was no longer necessary to explicate and mull over previous Indian country concepts. That was the promise of the new era. When Congress did all of that, it created something rather different, rather unique, rather simple, and yet rather daedalian.

We have been asked to confuse matters by applying out-of-date theories to a truly new concept of Indian relationships and sovereignty. We have been asked to blow up a blizzard of litigation throughout the State of Alaska as each and every tribe seeks to test the limits of its power over what it deems to be its Indian country. There are hundreds of tribes, and the litigation permutations are as vast as the capacity of fine human minds can make them. They can include claims to freedom from state taxation and regulation, claims to regulate and tax for tribal purposes, assertions of sovereignty over vast areas of Alaska, and even assertions that tribes can regulate and tax the various corporations created to hold ANCSA land. The latter assertion would give the tribes the power to control, regulate, and tax those corporations out of existence and would provide a fruitful area for intertribal conflict. This is no imaginative parade of horribles. In the cases before us today, one tribe, Kluti Kaah, seeks sovereignty over an area as unlike Indian country as one could imagine. The other seeks sovereignty, and has been made sovereign, over a piece of the State of Alaska about as large as the State of Delaware. Furthermore, both Kluti Kaah and Venetie assured us at argument that tribes, as they see it, do have the power to tax and regulate the myriad of private corporations which received land under ANCSA.

Were we writing on a clean slate, I would eschew the tribe's request and would avoid creating the kind of chaos that the 92nd Congress wisely sought to avoid. Alas, it is too late because we have already taken the position that ANCSA did not eliminate Indian country in Alaska. We have directed that decisions be made on a case-by-case basis. *See State of Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1390-91 (9th Cir.1988) (*Venetie I*); *cf. Native Village of Tyonek v. Puckett*, 957 F.2d 631, 634 (9th Cir.1992). It is unfortunate that what could have been a tessellation is to be a crazy quilt instead. But if we are to have that quilt, I agree that Venetie's territory is Indian country, if any still exists in Alaska.[1] Needless to say, I do not embrace that result with the gusto shown by the majority, and I do not accept all of the majority's reasoning.

Nevertheless, under the compulsion of our cases, I concur in the result.

[1] Of course, I recognize that there is an exception. One reservation was preserved. *See* 43 U.S.C. § 1618(a).

APPENDIX B

[Filed Aug. 2, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. F87-0051 CV (HRH)

STATE OF ALASKA, *ex rel.*, YUKON FLATS SCHOOL DISTRICT UNALAKLEET/NEESER CONSTRUCTION JV, UNALAKLEET NATIVE CORPORATION, NEESER CONSTRUCTION COMPANY, and GERALD NEESER,

Plaintiffs,

vs.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, a/k/a THE NATIVE VILLAGE OF VENETIE, THE VENETIE TAX COURT, THE VENETIE TAX COMMISSION, GIDEON JAMES, LAWRENCE ROBERTS, LARRY WILLIAMS, ERNEST ERICK, LINCOLN TRITT, JOHN TITUS, and DAVID CASE,

Defendants.

ORDER
(Decision—Indian Country)

This opinion constitutes the court's decision with respect to the contention of the defendants (herein collectively the Tribal Government) that the lands surrounding Venetie and Arctic Village, Alaska are Indian Country.[1]

[1] This case and the related case of *Native Village of Venetie I.R.A. Council, et al. v. State of Alaska, et al.*, Case No. F86-0075 CV ("Adoption Case"), were heretofore consolidated for purposes of trial. The cases were still consolidated when post-trial briefing on the issue which is the subject of this decision was filed. As a consequence, the briefing has been filed on behalf of the defendants in the name of Native Village of Venetie I.R.A. Council; however,

Introduction

This court has held that the Neets'aii Gwich'in of Venetie and Arctic Village, Alaska are a tribe of Indians. Order of December 23, 1994, at 23, *et seq.*.[2] The court turns now to the question of whether the lands of the Neets'aii Gwich'in which are held in fee simple by the tribes' political institution, the Native Village of Venetie Tribal Government, are Indian Country.

The history of this case is set out in detail in the court's tribal status decision. For purposes of this opinion, that case history is summarized as follows: In this case (herein sometimes the "Tax Case"), the plaintiff State of Alaska sought and was granted a preliminary injunction preventing assessment and collection of a gross receipts tax which Venetie sought to impose upon the contractor constructing a school for the State of Alaska. The Ninth Circuit Court of Appeals sustained that injunction. *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384 (9th Cir. 1988). In this court, the Tax Case was consolidated for trial with an adoption case, *Native Village of Venetie I.R.A. Council v. State of Alaska*, F86-0075 CV, for a trial of the "tribal status issues".[3] Trial of the tribal status issues, including Indian Country, was

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the court understands this briefing to be filed on behalf of all defendants in now-severed *State of Alaska, et al. v. Native Village of Venetie Tribal Government, et al.*, Case No. F87-0051 CV.

[2] Clerk's Docket No. 142 in Case No. F86-0075 CV, the Adoption Case. This order is hereinafter sometimes referred to as the "tribal status decision".

[3] Case No. F86-0075 CV, Clerk's Docket No. 65. It is clear from subsequent development of the case that all of the parties understood that the "tribal status issues" had reference to both tribal status per se *and* the Indian Country issue. *See* Joint Statement of Issues filed October 1, 1993, Clerk's Docket No. 95 in Case No. F86-0075 CV. The adoption case and the Tax Case have since been severed inasmuch as the adoption case does not involve a claim of Indian Country.

comenced on November 1, 1993, and concluded on November 5, 1993. By agreement of the parties, written briefs were filed in lieu of closing arguments. As to one aspect of the Indian Country issue, the court requested and received supplemental briefing from the parties. The question now before the court is whether the lands of the Neets'aii Gwich'in are Indian Country such that the Tribal Government has the power to impose taxes on nonmembers including the contractor who undertook to construct a school in Arctic Village for the State of Alaska.

The term "Indian Country" has a long, convoluted and interesting history. The term "Indian Country" is defined in 18 U.S.C. § 1151(b) as including "all dependent Indian communities within the borders of the United States. . . ."

The term dependent Indian community is not defined by statutory law and is ill-defined by case law. Based upon early case law, recent case law has suggested a set of factors which are relevant to a finding that certain lands are or are not Indian Country. These factors, such as the *nature* of the area claimed to be Indian Country or the *degree* of federal ownership and control of the area, are relative, not absolute. The case law is not always clear as to whether the focus of dependency is upon economics or politics. Based upon the review of relevant case law which follows, the court concludes that "dependent Indian communities" are Alaska Native tribes subject to the requisite degree of political superintendence[4] by the federal government and occupying lands set

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[4] The statutory use of the term "dependent" to modify Indian Country tends to suggest that the focus is upon the state of the tribe claiming to occupy Indian Country. This focus too easily leads to a discussion of only economics. Current Supreme Court case law as hereinafter discussed largely avoids the term "dependent" in favor of the terms "superintendence" or "federal supervision" which tend to broaden and shift the focus of atten-

aside for Alaska Natives as such. The court concludes that the requisite degree of superintendence exists where the degree of congressional and Executive agencies' control over the Alaska Native tribe is so pervasive as to evidence an intention that the federal government, not the state, be the dominant political institution in the area.

Development of Indian Country Case Law

During the early 1700s, Indian affairs were handled on a piecemeal basis by the individual colonies. In 1755, the British government, dissatisfied with the colonies' inconsistent treatment of the Indians, took the first step to centralize relations with the tribes. Two British superintendents were assigned the responsibilities of protecting the Indians from unscrupulous traders, negotiating boundary lines between the colonies and tribal lands, and enlisting the Indians to fight with the British in wartime. This approach met with only mixed success, and as a practical matter most trade relations remained in the hands of the colonists. Francis P. Prucha, *American Indian Policy in the Formative Years* 11 (1962) (hereinafter "Prucha, at —").

To strengthen British control over Indian affairs, King George III of England issued the Proclamation of 1763. The Proclamation established for the first time a boundary line between the lands of the Indians and those of the whites. This was the first official definition of Indian Country. The members of the British ministry agreed to temporarily draw the line along the crest of the Appalachian range. Everything to the west of the mountains and east of the Mississippi was Indian Country. Lands west of the Mississippi were claimed at that time by France or Spain.

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tion to the entirety of the relationship of the federal government to the tribe. *United States v. John*, 437 U.S. 634, 649 (1978).

Over the next few years, the British began the process of establishing a detailed boundary line by a series of treaties with individual tribes. By 1769, the line started in upper New York, near the eastern end of Lake Ontario, ran in a southerly direction to the Delaware River, then west to the Allegheny River, down that river to the Ohio, and west along the Ohio to the mouth of the Tennessee. It then ran through what is now Kentucky, along the back of the Carolinas, and through the future state of Georgia to the sea. Although the idea of a line was firmly entrenched, it constantly moved westward as the Indians were compelled to cede more lands through new treaties and purchases.

With the coming of the Revolution and the alliance of the Indians with the British, the Continental Congress was faced with the task of formulating its own policy regarding the Indians. The British approach to unified management had gained in success, and despite opposition by colonies that wished the authority to regulate trade with Indians, the new Congress[6] agreed that Indian affairs belonged to the central government. Congress asserted the sole and exclusive right to deal with the tribes. The first treaties after the Revolution continued to whittle away at Indian holdings, while white settlers relentlessly encroached on tribal lands without regard to treaty boundaries. *Id.* at 26-34.

By 1795, the constant intrusions of the whites upon Indian lands caused hostilities to escalate, and President Washington asked Congress to act. In response, Congress passed the Indian Intercourse Act of 1796. 1 Stat. 469.

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[6] The work of the constitutional convention having been completed, and the states having ratified the Constitution of the United States, effective May 4, 1789, the federal Congress became empowered "[t]o regulate Commerce with foreign Nations, and among the several States and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3.

This law contained the first statutory definition of Indian Country. It traced a convoluted line of treaty boundaries beginning at the present-day site of Cleveland, Ohio on the shores of Lake Erie south to the Ohio River, down that river to the mouth of the Tennessee, then along the back of the Carolinas and through Georgia to the sea. The Indian Intercourse Act of 1796 was recodified, with minor revisions that corresponded to treaty modifications, in 1799, 1 Stat. 743, and again in 1802, 2 Stat. 139.

The statutory definition of Indian Country remained unchanged until Congress undertook a wholesale revamping of Indian policy in 1834. The Intercourse Act of 1802 had long been subject to criticism as ineffective in meeting recurring problems in trade and land disputes. The regulation of traders needed to be tightened, the restrictions on liquor in the Indian Country needed better enforcement, and encroachment on Indian land had not been prevented. Congress determined to address all concerns in a single piece of legislation. The new legislation kept the idea of a boundary line between Indian lands and those of whites, but it was no longer practical, given the multiplication of treaties and changing circumstances of the Indians, to draw the line in detail as it had been in 1796, 1799 and 1802. *Prucha*, at 250-61.

The Indian Intercourse Act of 1834 began with this definition of Indian Country:

> Be it enacted . . ., That all that part of the United States west of the Mississippi [6], and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state[,] [7] to which the Indian title has not been

[6] In 1834, the land west of the Rockies was still claimed by Mexico or England.

[7] The bracketed comma was implied by the Supreme Court in *Bates v. Clark*, 95 U.S. 204 (1877), which is discussed below.

> extinguished, [shall] be taken and deemed to be the Indian country.

4 Stat. 729 (1834). This definition remained on the statute books until the compilers of the Revised Statutes omitted it, effecting its repeal in 1874. R.S. § 5596 (effective June 22, 1874). The Revised Statutes retained most of the substantive sections of the 1834 Act applicable in Indian Country, but without a statutory definition, the determination of what comprised Indian Country was left to the courts. Felix S. Cohen, *Handbook of Federal Indian Law* 31 (Rennard Strickland & Charles F. Wilkinson eds., 1982).

In 1877, the Supreme Court in *Bates v. Clark*, 95 U.S. 204 (1877), reviewed a case that arose before the repeal of the 1834 definition of Indian Country. *Bates* involved the legality of the seizure of liquor by a military officer on land in the Dakota Territory that had been ceded to the United States by the Indians. Under the wording of the 1834 definition, it was arguable that all of the Dakota Territory remained Indian Country despite Indian cessions. The court rejected that interpretation and implied a comma between the phrase "and not within any state" and the phrase "to which the Indian title has not been extinguished." Under this reading, the latter phrase applied to lands on either side of the Mississippi. Thus, aboriginal Indian lands were Indian Country as long as the Indians had title to it, but as soon as they parted with their aboriginal title it ceased to be Indian Country, without further act by Congress. *Bates*, 95 U.S. at 208-9. This definition was soon augmented to include reservation lands to which Indian title had not been extinguished, whether situated within a territory, *Ex Parte Crow Dog*, 109 U.S. 556 (1883) or a state *United States v. Le Bris*, 121 U.S. 278 (1887).

The next important extension of the *Bates* definition occurred in 1913 in the case of *Donnelly v. United States*,

228 U.S. 243 (1913), which presented the question of whether federal jurisdiction extended to a murder committed on an executive order Indian reservation. The reservation was located in a part of California to which aboriginal title had long been extinguished. The court affirmed the conviction, holding that:

> [Indian Country] cannot not be confined to land formerly held by the Indians, and to which their title remains unextinguished. And, in our judgment, nothing can more appropriately be deemed "Indian Country," . . . than a tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation.

Donnelly, 228 U.S. at 269. *Donnelly* was the first case in which the result turned on whether the land had been "set apart" by the government for Indians.

Also in 1913, the Supreme Court decided *United States v. Sandoval*, 231 U.S. 28 (1913). The *Sandoval* decision is particularly important because it focused upon the concept of a "dependent Indian community."

The subject of *Sandoval* was a criminal prosecution under federal law for introducing liquor into the Santa Clara Pueblo in New Mexico. The New Mexico Enabling Act, 36 Stat. 557 (June 20, 1910), provided that as a condition of statehood New Mexico must prohibit the introduction of liquor into Indian Country, including the lands owned by the Pueblo Indians. The United States District Court had dismissed Sandoval's indictment on the grounds that the application of federal law to the Pueblo Indians was a usurpation of *state* police power beyond the limits of the *congressional power* to regulate Indian affairs. *United States v. Sandoval*, 198 Fed. 539 (D.N.M. 1912). The Supreme Court reversed.

The Pueblo lands were held by the tribe in communal fee simple under grants from the King of Spain in the 17th century. When New Mexico became a portion of

the United States under the treaty of Guadalupe Hidalgo in 1848, the treaty provided that the property rights of the New Mexican citizens would be "inviolably respected." Treaty with the Republic of Mexico, Feb. 2, 1848, 9 Stat. 922, 929. Soon thereafter, Congress made it the duty of the Surveyor General of New Mexico to submit a report to Congress regarding the extent of the Pueblo land titles. 10 Stat. 308 (July 22, 1854). Congress then confirmed the bona fide claims of the Pueblo Indians and relinquished all claims by the United States to their lands. By this act of confirmation Congress did not "set aside" federal lands for the use and occupancy of Indians. However, Congress expressly provided in New Mexico Enabling Act that Pueblo lands were "Indian Country" for purposes of federal liquor laws.[8]

Contrary to a common perception of *Sandoval*, it was not a case where the United States Supreme Court itself extended the prior case law of Indian Country so as to include fee land acquired by Indians from third parties as distinguished from a government set-aside of land. Congress itself had declared the Pueblo lands to be Indian Country. What the Supreme Court had to decide in *Sandoval* was the question of whether the prohibition of introducing liquor into New Mexico as contained in the New Mexico Enabling Act unconstitutionally infringed upon a state's retained power (the equal footing doctrine). It was in this context that the Supreme Court discussed, at very great length, the circumstances of the Pueblo Indians. The Court referred to the Pueblo people as "simple, uninformed and inferior." *Sandoval*, 231 U.S. at 39. It characterized them as being in need of "special

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[8] Section 2 of the New Mexico Enabling Act, 36 Stat. 557 (June 20, 1910), provided in pertinent part that:

> [T]he sale, barter or giving of intoxicating liquors to Indians and the introduction of liquors into Indian country, which term shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico, are foreover prohibited.

consideration and protection." *Id.* The Court noted that "public moneys have been expended in presenting them with farming implements [etc.]". *Id.* The Supreme Court included a long recitation of information from reports of government agents with respect to the Pueblo Indians, which reports were characterized as showing "that they [the Pueblo people] are dependent upon the fostering care and protection of the Government, like reservation Indians in general; that, although industrially superior, they are intellectually and morally inferior to many of them; and that they are easy victims to the evils and debasing influence of intoxicants." *Id.* at 40-41.[9]

With the facts thusly discussed, the Supreme Court turned to precedents bearing upon the legal question before it observing:

> Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising

[9] The Supreme Court's factual finding that the Pueblo Indians were a "simple, uninformed and inferior people", and so forth, was contrary to the opinion of the District Court Judge who noted that

> [i]ntegrity and virtue among them is fostered and encouraged . . . [T]hey are a peaceable, industrious, intelligent, honest, and virtuous people. They are . . . superior to all but a few of the civilized Indian tribes of the country, and the equal of the most civilized thereof.

198 Fed. at 544 *quoting United States v. Lucero*, 1 N.M. 422 (N.M. 1869).

The Supreme Court's measure of dependency, which could be charitably described as paternalistic or more realistically as racist, is no longer relevant in today's legal framework. Nevertheless, properly understood and restricted to its holding on the law, *Sandoval* remains useful because it is a part of the legal foundation for the enactment of 18 U.S.C. § 1151(b).

> a fostering care and protection over all dependent Indian communities within its borders. . . .

Id. at 45-46. The Court summarized prior case law as holding that:

> [I]t may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the Government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not for the courts, to determine when the true interests of the Indian require his release from such condition of tutelage.

Id. at 46 (quoting *Tiger v. Western Investment Co.*, 221 U.S. 286, 315 (1911)). On the basis of the foregoing, the Supreme Court held that:

> [T]he legislative and executive branches of the Government have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection, like other Indian tribes, and, considering their Indian lineage, isolated and communal life, primitive customs and limited civilization, this assertion of guardianship over them cannot be said to be arbitrary but must be regarded as both authorized and controlling.

Id. at 47. Addressing an argument that the Pueblos' fee simple title was an impediment to the proscription of liquor by the New Mexico Enabling Act, the Supreme Court observed that while the Indians did have fee title to the land in question, it was nonetheless observed that this was a "communal title, no individual owning any separate tract." *Id.* at 48. The court characterized the land as "public lands of the pueblo" and as such "subject to the legislation of Congress enacted in the exercise of the Government's guardianship over those tribes and their affairs." *Id.* The Court held that Congress had the con-

stitutional power to "apply the [liquor] prohibition to the lands of the Pueblos." *Id.*

The next year following *Sandoval*, the Court in *United States v. Pelican*, 232 U.S. 442 (1914), held that a trust allotment is Indian Country for purposes of the Indian Country Crimes Act. The Court, citing *Donnelly*, stated that the test for determining whether an allotment was Indian Country was whether the land in question "had been validly set apart for the use of the Indians as such, under the superintendence of the Government." *Pelican*, 232 U.S. at 449. As in *Donnelly*, the "set apart" language was used in *Pelican* to refer to a type of federal trust land.

The last major development in the case-law definition of Indian Country came in *United States v. McGowan*, 302 U.S. 535 (1938). The issue in *McGowan* was whether land in Nevada purchased after statehood by the federal government and held in trust for Indians was Indian Country. The Court, citing *Sandoval*, characterized the area as a dependent Indian community. It concluded that the trust lands in question were the functional equivalent of a reservation, and, relying on *Pelican*, it held that Indian Country includes lands wherever situated, which have been validly set apart for the use of Indians under the superintendence of the government. *McGowan*, 302 U.S. at 539.

In 1948, in order to overcome confusion which had arisen on the subject, Congress enacted a statutory definition of Indian Country:

> [T]he term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory

> thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151.[10] Section 1151 is in substance a codification of *Donnelly*, *Sandoval*, *Pelican*, and *McGowan*. Revisor's note, 1948 Act, Title 18 U.S.C.A. at 86 (West 1986). Subsection (a) regarding reservation lands is a codification of *Donnelly*, (c) represents the holding of *Pelican* regarding allotment lands, and (b) is a codification of the "dependent Indian community" concept as developed in *Sandoval* and *McGowan*.

Appropos of its common law heritage, the concept of Indian Country has continued to develop in courts of appeals and in the United States Supreme Court since the 1948 codification of the term. What emerges first, and from the courts of appeals, is a fact oriented methodology for evaluation of claims of Indian Country. Secondly, and coming from the United States Supreme Court decisions, we see a dramatic focusing upon the question of whether land has been validly set apart for the use of Indians as such, under superintendence of the government.

Two circuit court decisions, *United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971), and *United States v. South Dakota*, 665 F.2d 837 (8th Cir. 1981), appear to lead the way in shaping the law of Indian Country subsequent to the enactment of 18 U.S.C. § 1151. It is these two cases which the Ninth Circuit Court of Appeals drew upon for its analysis of the merits of the Indian Country issue before it on interlocutory appeal from this court's earlier decision granting a preliminary injunction in favor

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[10] Although codified in Title 18 of the United States Code which covers crimes, there is no question but what the statutory definition of Indian Country has application in civil law as well as criminal law. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 (1987).

of plaintiffs in this case. Each of *Martine* and *South Dakota* set out a multi-factored scheme of analysis for a determination of the "quite factually dependent" Indian Country issue. *Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1391 (9th Cir. 1988).

In *Martine*, the Tenth Circuit concluded that the Navajo community of Ramah, New Mexico, was a dependent Indian community within the meaning of section 1151(b). The land in question was owned in fee by the Navajo tribe, having been purchased with tribal funds from a private corporate owner. The land was not within the boundaries of any Indian reservation. The land had never been set aside in any way by the federal government for the tribe.

In making its decision in *Martine*, the court relied upon *Sandoval*, drawing from the Supreme Court's discussion of the dependent Indian community status of the Pueblo Indians. The Tenth Circuit concluded that the trial court in *Martine* had properly considered the following factors:

> [1] [T]he nature of the area in question,
>
> [2] [T]he relationship of the inhabitants of the area to Indian Tribes and to the federal government, and
>
> [3] [T]he established practice of government agencies toward the area.

Martine, 442 F.2d at 1023.

In *South Dakota*, the Eighth Circuit dealt with a housing project located in Sisseton, South Dakota, concluding that it was a dependent Indian community. The land in question was within the boundaries of a terminated reservation. The land had been returned to public domain, sold by the United States, then reconveyed to the United States in trust for purposes of the housing project.

Relying in part upon *Martine*, the Eighth Circuit in *South Dakota* announced its formulation of the factors to be considered in determining whether a particular geographic area is a dependent Indian community:

> (1) whether the United States has retained title to the lands which it permits the Indians to occupy and authority to enact regulations and protective laws respecting this territory, . . .
>
> (2) the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area, . . .
>
> (3) whether there is an element of cohesiveness . . . manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality, . . . and
>
> (4) whether such lands have been set apart for the use and occupancy and protection of dependent Indian peoples. . . .

South Dakota, 665 F.2d at 839 (internal quotations and citations omitted).[11] Applying these factors to the evidence in *South Dakota*, the court determined that the land in question was a dependent Indian community and Indian Country. In analyzing the factors, the court held that the presence of a small number of non-Indian residents did not defeat a finding of a dependent Indian com-

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[11] This formulation comes from the earlier Eighth Circuit case of *Weddell v. Meierhenry*, 636 F.2d 211, 212-14 (8th Cir. 1980), *cert. denied*, 451 U.S. 941 (1981), which in turn quotes in the order appearing above, *United States v. McGowan*, 302 U.S. 535, 539 (1938), *United States v. Martine*, 442 F.2d 1022, 1023 (10th Cir. 1971), *United States v. Morgan*, 614 F.2d 166, 170 (8th Cir. 1980), and *United States v. Mound*, 477 F. Supp. 156, 158 (D.S.D. 1979), which in turn cites other earlier cases.

munity. *Id.* at 842. The court observed that cohesiveness or common interests are more important to the existence of a community than mere numbers of people. The factors set out in *South Dakota* are to be evaluated on the basis of what is now, not on the basis of whether land might ultimately lose its status as Indian Country. *Id.* An assertion of state jurisdiction over the land does not defeat a finding of a dependent Indian community. *Id.*

Prior to the Eighth Circuit decision in *South Dakota,* the United States Supreme Court decided *United States v. John,* 437 U.S. 634 (1978). The case seems not to have attracted as much attention in Indian law cases as one might have expected. *John* is briefly mentioned in *South Dakota* for the proposition that a state assertion of jurisdiction over land does not necessarily defeat a finding of a dependent Indian community.

In *John,* the Supreme Court dealt with Choctaw Indian lands which the government had purchased for the Mississippi Choctaws and which Congress had declared to be trust lands. Subsequently, the Department of the Interior proclaimed these same lands to be a reservation.

The defendant, John, was indicted by a federal grand jury. He was tried and convicted of simple assault. On appeal, the Fifth Circuit held that the lands in question were not Indian Country and for this reason, John could not be prosecuted under federal law. *See* 18 U.S.C. § 1153. While the federal appeal was underway, John was indicted by a state grand jury in connection with the same incident giving rise to the federal prosecution. John was convicted of a more serious offense after a state court trial. He appealed, and the Mississippi Supreme Court affirmed, holding that the federal court did not have jurisdiction.

The United States Supreme Court rejected the conclusion of the Fifth Circuit and the Mississippi Supreme

Court on the Indian Country issue. After expressly taking notice of the three categories of land which Congress defined as Indian Country, it held, drawing upon the authority of *McGowan* and *Pelican*, that the test for the existence of Indian Country is, "whether the land in question 'had been validly set apart for the use of Indians as such, under the superintendence of the Government.'" *John,* 437 U.S. at 649 (quoting *United States v. Pelican,* 232 U.S. 442, 449 (1914), and *United States v. McGowan,* 302 U.S. 535, 539 (1938)). The Court held that the lands purchased for the Choctaws by the government, declared by Congress to be trust lands and by the Executive to be a reservation, constituted a set-aside of land for the use of Indians as such. The Court observed that "[t]he Mississippi lands in question here were declared by Congress to be held in trust by the Federal Government for the benefit of the Mississippi Choctaw Indians who were at that time under federal supervision." *John,* 437 U.S. at 649. This court takes the foregoing statement to reinforce a point that is easily overlooked: it is not *land* but *Indians* which must be under the superintendence of the government in the *Pelican/John* test for Indian Country.

The Court rejected Mississippi's contention that the Choctaw's had been assimilated and were no longer subject to federal government supervision. As regards superintendence, *John* contains several significant holdings. Firstly, the fact that the Mississippi Choctaws were a "remnant" of a larger tribe which had been forced out of Mississippi did not defeat "federal power to deal with [the remnant]." *John,* 437 U.S. at 653. Secondly, the fact that federal supervision of the Mississippi Choctaws was not continuous did not defeat "federal power to deal with them." *Id.* Thirdly, citizenship status did not defeat the power of Congress to legislate for the Mississippi Choctaws. *Id.*

In 1991, in a case somewhat more analogous to that before this court, the United States Supreme Court again returned to the Indian Country question in *Oklahoma Tax Comm'n v. Citizen Band Potowatomi Indian Tribe of Oklahoma,* 498 U.S. 505 (1991). In *Potowatomi,* the Indian tribe sold cigarettes without collecting state sales taxes from a store located upon land held in trust for the tribe by the federal government. Oklahoma sought to collect the taxes. The tribe sued to enjoin the collection of taxes and Oklahoma counterclaimed seeking both to collect the taxes past due and to enjoin the tribe from further sales without collecting applicable state taxes. The bulk of the discussion in *Potowatomi* has to do with issues of jurisdiction and sovereignty. The case is of value here, however, because unlike *John* which dealt with reservation lands, the land in *Potowatomi* was not in a reservation although it was, as indicated above, held by the federal government in trust for the tribe.

The Court held in *Potowatomi* that the characterization of land as a tribal trust lands and reservations was not significant. Speaking for the Court, the Chief Justice wrote:

> In *United States v. John,* 437 U.S. 634 (1978), we stated that the test for determining whether land is Indian country does not turn upon whether that land is denominated "trust land" or "reservation". Rather, we ask whether the area has been " 'validly set apart for the use of the Indians as such, under the superintendence of the Government.' " *Id.,* at 648-49; *see also United States v. McGowan,* 302 U.S. 535, 539 (1938).

Potowatomi, 498 U.S. at 511.

One final circuit level case merits mention at the conclusion of this review of Indian Country case law. In *Buzzard v. Oklahoma Tax Comm'n,* 992 F.2d 1073

(10th Cir. 1993), the Tenth Circuit revisited the Indian Country issue. In *Buzzard,* a band of Cherokee Indians who were organized as a tribe purchased fee land. Under the tribal charter, the tribe could not sell the land without federal approval. It was contended that such approval constituted sufficient federal government involvement for the land to have been validly set apart for Indians as such. The district court held that federal approval of a sale was not the equivalent of a federal set-aside of land for the tribe. The district court concluded that the land in question was not Indian Country. With nary a mention of its decision in *Martine* some twenty years previous, the Tenth Circuit affirmed.[12]

In *Buzzard,* the circuit court expressly recited the Indian Country definition of section 1151 noting that:

> In addition the Supreme Court has held that Indian country includes land " 'validly set apart for the use of Indians as such, under the superintendence of the Government.' " *Potowatomi Indian Tribe,* [498 U.S. at 511 (quoting *John,* 437 U.S. at 649)].

Buzzard, 992 F.2d at 1076. Thereafter, and without reference to the concept of a dependent Indian community, the circuit court proceeded to analyze the set-aside issue which confronted it. Pertinent to a fuller understanding of the concept of a set-aside, the Tenth Circuit observed, "land is 'validly set apart for the use of Indians as such', only if the federal government takes some action indicating that the land is designated for use by Indians." *Id.* Similarly, the Tenth Circuit observed that "[s]uper-

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[12] As discussed above, the Tenth Circuit in *Martine* held that fee land purchased by a tribe was Indian Country. Not surprisingly because it preceded *John, Martine,* while including as a factor to be considered the established practice of government agencies toward the area, does not focus the attention upon land being set aside for the use of Indian people as does *John, South Dakota,* and *Potowatomi.*

intendency over the land requires the active involvement of the federal government." *Id.* The court concluded that holding land in trust shows that the government means to exert jurisdiction over the land. Applying these views, the court concluded that the tribal land in question had not been validly set apart for the tribe's use by the federal government even though Secretarial approval of any sale was required under the tribe's charter. The land was acquired by the tribe unilaterally. The court emphasized that the land in question was acquired just as any other person might do, an apparent reference to the requirement that land be set aside for Indians *as such*.[13] After discussing how certain consequences[14] of finding Indian Country supported the conclusion that the tribal lands in *Buzzard* were not Indian Country, the court concluded with the observation that, "[n]othing in *McGowan* or the cases concerning trust land indicates that the Supreme Court intended for Indian tribes to have . . . unilateral power to create Indian country." *Id.* at 1077.

This court concludes that *Buzzard* and the United States Supreme Court cases upon which it is founded overturn *Martine* to the extent that the latter case suggests that a tribe may add to Indian Country by simply purchasing fee title to property from a private, third party. *Sandoval*, however, stands unaffected by *John* and *Potowatomi* owing to the fact that Congress declared

[13] In *Buzzard*, the Tenth Circuit continued with a discussion of whether or not the subject "land [is] superintended by the federal government." *Buzzard*, 992 F.2d at 1076. As discussed above in connection with *John*, this discussion appears misdirected; for the United States Supreme Court has said that the question of land being set aside for Indians as such is one factor and the superintendence of Indians, not land, is another factor.

[14] The court discussed as flowing from an Indian Country determination the limitation of state criminal jurisdiction (which is not a factor in the instant case) and the impact of an Indian Country determination on taxing powers of states.

the Pueblo lands to be Indian Country as a matter of federal law even though the Pueblo lands were not set aside by the federal government. This court also concludes, based upon *Potowatomi*, that it does not matter as regards the Indian Country issue whether the Neets'aii Gwich'in do or do not have a reservation. Reading *John* and *Potowatomi* together, what does matter is whether, as a matter of fact, the Neets'aii Gwich'in lands have been set aside for Native Alaskans, as such, under the superintendence of the government. To prevail, the defendants must prove, by a preponderance of the evidence, (1) that the Tribal Government holds land set apart for Alaska Natives as such, and (2) that the Tribal Government is under the active supervision of the federal government.[15]

Re-examination of Indian Country Factors

As already noted above, the prior, interlocutory decision in this case has aptly suggested that:

> [W]hether an Indian community is Indian country is quite factually dependent. It is also dependent on whether the inhabitants constitute a tribe for legal purposes, which, as we discussed earlier, is another complex factual question.

Venetie, 856 F.2d at 1391. Without reference to either *John* or *Potowatomi*, the Ninth Circuit in *Venetie* directs this court to the factors discussed above in *Martine* and *South Dakota* for purposes of resolving the factual issues raised by a claim of Indian Country. Again, these factors are, from *Martine*: (1) the nature of the area, (2) the relationship of the area inhabitants to Indian tribes and the federal government, and (3) the established practice of government agencies toward the area; and, in addition, from *South Dakota*: (1) the degree of federal owner-

[15] This court does not mean to ignore other factors relevant to a claim of Indian Country. These two factors are the dispositive aspects of this case.

ship and control of the area, (2) the degree of cohesiveness of the area inhabitants, and (3) the extent to which the area was set aside for the use, occupancy and protection of dependent Indian peoples. *See Venetie*, 856 F.2d at 1391.

This court's review and analysis of the case law of Indian Country suggest the need for some revision of these six factors which are somewhat overlapping. The court reforms, and will then apply these factors in this case as follows:

(1) the nature of the area;

(2) the relationship of the area inhabitants to one another, to Indian tribes, and the federal government;

(3) the extent to which the inhabitants and Indian tribes of the area are under the superintendence of the federal government; and

(4) the extent to which the area was set aside for the use and occupancy of Indians as such.

This court views that portion of its second factor having to do with area inhabitants as incorporating the cohesiveness concept later expressed in *South Dakota*. This court considers the third *Martine* factor (practice of government agencies toward the area) to have been subsumed by the requirement of Indian superintendence by the federal government. Finally, this court considers the degree of federal ownership and control factor from *South Dakota* to largely overlap the requirement that land be set aside for Indians, as such.

This court's formulation of factors for determining whether a tribe occupies Indian Country, on the basis of *Venetie*[16] is seen as flexible and variable. The facts of

[16] In *Venetie*, 856 F.2d at 1391, the circuit court introduced the *South Dakota* factors with the relative terms "the degree of" and "the extent to which" a factor exists.

each case are different. The concepts of cohesiveness, superintendence, dependence and the set-aside of land are not absolute terms. In the end, this court must decide whether federal government activity directed at Indians (superintendence) and whether the tribal land status (a set-aside) evinces an intention that the federal government, not the state, be the dominant political institution in the area.

One final observation concerning the foregoing factors seems in order. In analyzing this case and in particular the recent decisions of the United States Supreme Court, this court has asked itself the question: has a set-aside of land for Indians, as such, under the superintendence of the federal government become the *sine qua non* of Indian Country? Put more simply, are the other factors even relevant any more?

This court concludes, on the basis of *John* and *Potowatomi* that Indian Country cannot exist at all without proof of three elements, one of which has almost never been in contest in the Indian Country case law and therefore receives little or no mention. As is explicit in the Ninth Circuit Court's interlocutory decision in this case, a claim of Indian Country must be brought by an Indian tribe. *Venetie*, 856 F.2d at 1391. Secondly, the tribe must be under the active superintendence of the federal government. Thirdly, the tribe must have had land set aside by the federal government for its people as Natives. If the proof of the claimants to Indian Country fails as to any one of these elements, then the claim of Indian Country fails. The other factors having to do with the area and its inhabitants and their relationships to one another, the tribe and the government focus principally on geographic and demographic considerations which have relevance principally where there is some significant disagreement as to the *extent* of Indian Country as distinguished from its existence per se.[17]

[17] In this regard, the court recognizes that there is still some overlap between its factor 2 as regards the relationship of area

The court proceeds now with the analysis of whether or not the Tribal Government has established by a preponderance of evidence that its lands are Indian Country.

Application of the Indian Country Factors

In its tribal status decision, this court has made fact findings and has concluded that the Neets'aii Gwich'in are a sovereign tribe as a matter of common law. With this prerequisite having been established, the Native Village of Venetie Tribal Government, which the court finds to be the institutional pseudonym for the tribe, is entitled to bring its claim that the lands occupied by the tribe are Indian Country.

What follows is the court's fact finding and legal analysis of the Indian Country factors.

Nature of the Area [18]

In the tribal status decision, the court set out its findings with respect to the geography of the area occupied by the Neets'aii Gwich'in.[19] The Tribal Government owns a huge tract of land (roughly the size of the State of Delaware) located south of the Brooks Range, north of

residents to the federal government and factor 3 having to do with superintendence of Indian tribes by the federal government. Although the same facts may well be relevant as to both factors, the focus is different. The location of dealings between inhabitants and federal agencies may well help define the geographic extent of Indian Country where that is at issue. Where, as here, a principal issue is the extent of superintendence, the focus is upon federal activity per se—what have Congress and the Executive agencies done in relating to Native people as distinguished from where the activity has effect.

[18] Although not case dispositive, the court has determined to evaluate factors 1 and 2, nature of the area, and relationships of the area inhabitants, because they involve informative background material which will serve to establish a context for the discussion of other factors which are dispositive of the case.

[19] Tribal Status Decision, Clerk's Docket No. 142 at 34-36 in the Adoption Case, Case No. F86-0075 CV.

the Yukon River and between the east fork of the Chandalar River and the Christian River. Trial Exhibit 206.[20] The lands controlled by the Neets'aii Gwich'in are isolated. No road or railroad serves the area; however, one or more landing strips for aircraft have been constructed in the area and access to the perimeter of the area by river boat is feasible during temperate weather. While the area has, from time immemorial, been crisscrossed with trails, there are no roads within the former Chandalar Reservation. With the exception of the modest houses and a very few public buildings which serve the Neets'aii Gwich'in almost exclusively, the area is totally undeveloped. There are no mines or other natural resources extraction facilities in the area. Indeed, there is no manufacturing industry of any kind in the area; and the construction industry is dominated by government funded projects. With the exception of a few non-Native school teachers, the residents of the lands of the Neets'aii Gwich'in are all members of the tribe. By and large they reside in two communities, Arctic Village and the Native Village of Venetie.

In 1979, as a part of a settlement of Alaska Native land claims, a United States patent was issued conveying the former Chandalar Reservation to Neets'ai Corporation and Venetie Indian Corporation. The grantees received unrestricted fee title subject only to "valid existing rights".[21] The patent recites that the area consists of

[20] Plaintiff State of Alaska's exhibits are identified by letter. Defendant Tribal Government's exhibits are identified by number. The plaintiff and defendant party designations on the respective exhibit tags are reversed insofar as the position of the parties in this case because the exhibits were used in the trial of both the Adoption Case and the Tax Case. In the Adoption Case, the Tribal Government was plaintiff and the State of Alaska was defendant.

[21] Trial Exhibit 109. The village corporation of Arctic Village (Neets'ai Corporation) received an undivided 147/303 interest. The village corporation of the Native Village of Venetie (Venetie Indian Corporation) received an undivided 156/303 interest. The settlement of Alaska Native land claims is discussed hereinafter.

1,799,927.65 acres based upon a survey of the land. The area claimed to be Indian Country is readily identifiable. This same area was conveyed by warranty deeds dated September 1, 1979, from the two village corporations to the Tribal Government.[22] The evidence shows that the Neets'aii Gwich'in, while taking advantage of many health, education and general welfare programs of the state and federal governments, prefer and by and large continue to follow a traditional, subsistence lifestyle. The lands controlled by the Tribal Government are well suited to serving and supporting a subsistence lifestyle. The Neets'aii Gwich'in in fact use the area in question for this purpose.

Relationship of the Area Inhabitants to One Another, to Indian Tribes, and to the Federal Government

Analysis of the tribal status of the Neets'aii Gwich'in required this court to consider whether they were a group united in a community and whether the group is under one leadership or government.[23] The second factor pertinent to a finding of Indian Country involves similar considerations: here we consider the cohesiveness of the area inhabitants, their relationship to the tribe and their relationship to the federal government. The relationships with the federal government will have only slight mention here, for in this case that subject is more properly a part of the question of whether or not the tribe and its members are under federal government superintendence.

In connection with this Indian Country decision, the court sees only a modest need to augment its previous findings as regards the relationship of the Neets'aii Gwich'in amongst themselves and to their tribe. Summarizing those earlier findings, and for purposes of this

[22] Trial Exhibit 106.

[23] Tribal Status Decision, Clerk's Docket No. 142 at 31 in the Adoption Case, Case No. F86-0075 CV.

Indian Country decision, the court finds that the Neets'aii Gwich'in are a cohesive community. All but a few residents of the area (notably school teachers) are Alaska Natives and members of the tribe. They have at all times relevant to this case, right down to the present, voluntarily come together for purposes of forming their own traditional councils which have provided for the protection and welfare of the whole community. The fact that the Neets'aii Gwich'in have chosen to recognize subcommunities in the form of the Native Village of Venetie and Arctic Village as well as an umbrella organization which acts on behalf of the whole tribe does not detract from the community or cohesiveness which the court finds to exist between the members of the tribe. The court further finds that there are no other meaningful political institutions formed by either the people of the tribe or anyone else in the area.

The Neets'aii Gwich'in have significant contacts and relationships with numerous agencies of the state and federal government. The state as well as the federal government provide and/or fund significant health, education and welfare projects and services for the area in question. The Neets'aii Gwich'in have actively participated in various governmental programs which involve applying for and administering grants. Substantial interaction by the tribe and its members with the State of Alaska, including the providing of significant services by the State of Alaska, is not inconsistent with a finding of Indian Country if all of the elements of such are proven.[24]

Finally, as suggested above and discussed in the tribal status decision,[25] the Neets'aii Gwich'in are the modern

[24] "[T]he provision of state services to Indians would not prove that the Federal Government had relinquished its ability to provide for those Indians under its Article I power." *John*, 437 U.S. at 652 n.23.

[25] Tribal Status Decision, Clerk's Docket No. 142 at 48-51 in the Adoption Case, Case No. F86-0075 CV.

successor to the historic tribe. The traditional councils and Tribal Government which operate today have their roots in the pre-contact tribe. Despite significant contact with non-Native state and federal institutions, assimilation is not underway to any significant degree. Arctic Village and the Native Village of Venetie and their environs are today a distinctly Native community. The fact that some tribal members may live and work elsewhere or seek education elsewhere does not in any significant, measurable degree detract from the cohesiveness and community which the court finds to exist amongst the Neets'aii Gwich'in people.

Extent to Which the Inhabitants and Indian Tribes of the Area are Under the Superintendence of the Federal Government

The court examines next the third factor which must be established by a preponderance of the evidence for Indian Country to exist: the tribe claiming to occupy Indian Country must be under federal superintendence. This concept brings into play the "dependent" component of the second form of Indian Country defined by 18 U.S.C. § 1151(b). It is in this area that the case law developed above becomes most important.

The concept of dependence as regards American Indian tribes in fact pre-dates *Sandoval*. In the course of formulating the relationship which would exist beween the United States and Indian tribes, Chief Justice Marshall in *Cherokee Nation v. Georgia*, 30 U.S. 1, 21 (1831), characterized Indian tribes as "domestic dependent nations." In *Cherokee Nation* as well as *Worcester v. Georgia*, 31 U.S. 515 (1832), Chief Justice Marshall used much language which is familiar to us even today as regards Indian tribes and their relationship to the federal government. As discussed in detail above, the Supreme Court spoke again of dependent Indian communities in *Sandoval*, 231 U.S. at 46; and here also the focus of

the discussion was the relationship between distinctively Indian communities and the federal government, in particular Congress, which has the primary obligation of determining for what period of time and to what extent Indian tribes shall remain under the guardianship and protection of the United States. *Id.* In *John* and *Potowatomi*, the Supreme Court has used different words—speaking of superintendence of Indian tribes by the United States, but the substance of the concept is the same.

In briefing this issue for the court, the parties have discussed whether dependence should be viewed in an economic or a political context. The foregoing (especially *Sandoval* and *John*) shows that the focus should be political. As the dominant sovereign entity, it is for the federal government to determine for what time and to what extent tribes will be supervised. That is a political consideration. The court does not suggest that the economic relationship between the federal government and a tribe is irrelevant. Benefits provided to tribes by the federal government are some evidence of a congressional determination to continue superintendence. Our inquiry is the broader one of the totality of the interaction (the political relationship) between the federal government and the tribe wherein the focus is upon how the federal government conducts itself toward the tribe, not the reverse. Superintendence by the federal government, and the consequential political dependence on the part of the tribe, exists for purposes of section 1151(b) where the degree of congressional and executive control over the tribe is so pervasive as to evidence an intention that the federal government, not the state, be the dominant political institution in the area.[26]

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[26] "[T]he Indian country classification is the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian lands." *Indian Country, U.S.A., Inc. v. Oklahoma Tax Comm'n*, 829 F.2d 967, 973 (10th Cir. 1987). The foregoing quotation is followed by a litany of authorities including Felix S. Cohen, *Handbook of Federal Indian Law* 5-8

The court has already discussed some of the facts proved at trial relevant to this inquiry. Those will now be reiterated and the court's further findings pertinent to federal superintendence in this case follow.

From early in this century, there has been contact between Executive agencies of the United States Government and the Neets'aii Gwich'in. Educational and health services came early. The Bureau of Indian Affairs operated a school at Arctic Village until 1970 and at Venetie until 1984. Testimony of Tozer, ¶ 4. Although it receives some federal aid for schools, the State of Alaska now operates the schools at Arctic Village and Venetie. *Id.*, ¶ 5. Health care in the area is now provided through the integration of various state and federal programs.

There is a long history of political intercourse between the tribe and the Bureau of Indian Affairs. The Native Village of Venetie obtained one of the earlier Indian Reorganization Act approved constitutions.

While there continues to be considerable interaction between federal agencies and the tribe, the evidence shows a change of some significance in the mode of providing these services. To a significant degree, federal largess is now available in the form of grants and other programs which are administered by Native people themselves with general oversight by agencies as opposed to direct agency

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(1942) ("Indian country" generally determines allocation of tribal, federal, and state authority). *See also* Op. Solic. Dep't Interior, M-36975 (Jan. 12, 1993) at 116, where the Solicitor opines that:

> [W]e repeat the guiding principle that Indian country comprises those lands that Congress intended, as a general matter, to be beyond the jurisdictional reach of the state and subject to the primary jurisdiction of the Federal Government and tribes, even though those lands are geographically within the boundaries of a state.

services to the tribe.[27] The State of Alaska has also funded similar projects.[28]

Until 1971, there is little doubt but what the Neets'aii Gwich'in were treated by Congress and the Executive agencies as being subject to active superintendence to such a degree as to amount to a dependent Indian community for purposes of 18 U.S.C. § 1151(b). In 1971, as a part of the settlement of claims to aboriginal title to land and hunting and fishing rights, Congress enacted the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601, *et seq.* (ANCSA), and thereby effected a significant change in relationship as between the federal government and Alaska Natives. The legal and factual history of Alaska Native land claims was discussed extensively and was published by Judge Fitzgerald of this court in *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1014 (D. Alaska 1977), *aff'd on appeal* 612 F.2d 1132 (1980).

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[27] Federal grants have been approved for an airport at Arctic Village, Trial Exhibit 127, a 29-unit housing project at Venetie, Trial Exhibit 118, water and wastewater systems at Arctic Village and Venetie, Trial Exhibits 155, 156, housing renovation at Venetie, Trial Exhibit 155, and a self-governance project. Trial Exhibit 163 at 12. There were other similar federal grants as well.

[28] State grants have beeen approved for community halls and health clinics at Arctic Village and Venetie, replacement or repair of federally funded water systems, Testimony of Capito, ¶¶ 3-4, power generating equipment, and electric distribution systems, Testimony of Bavard, ¶ 3(a) and (b), Testimony of Manni, ¶¶ 7-8. The state has twice replaced power generating equipment originally installed with state money at Venetie, Testimony of Manni, ¶¶ 2, 3, 5, and has similarly replaced construction equipment lost in a fire. Testimony of Crommett, ¶¶ 2-4. The State of Alaska subsidizes the operation of electric utilities, Testimony of Manni, ¶¶ 6, 9, makes general revenue sharing grants to unincorporated communities such as Arctic Village and Venetie for general public purposes, Testimony of Rolfzen, ¶ 2, provides public assistance payments and unemployment insurance payments, Testimony of Randy Moore, ¶¶ 2, 3, Testimony of Sturrock, ¶ 3, and regulatory and law enforcement activities. For example, Testimony of Justice, ¶¶ 2, 3, 5, and Testimony of Stearns, ¶¶ 2-6.

In declaring a settlement with Alaska Natives, Congress expressly provided that all prior conveyances of public lands, including tentative approvals of lands under the Alaska Statehood Act, constituted an extinguishment of aboriginal title. 43 U.S.C. § 1603(a). Congress abolished all other aboriginal land titles including those with respect to submerged lands as well as aboriginal hunting and fishing rights. 43 U.S.C. § 1603(b). Finally, in extremely broad language, Congress extinguished all claims based on claims of aboriginal title or based on any statute or treaty of the United States relating to Native use and occupancy of land. 43 U.S.C. § 1603(c).[29]

In exchange for all of the abrogated rights, Congress made provision for land grants totalling 44 million acres and the payment of over 962 million dollars. 43 U.S.C. §§ 1613, 1605, 1608(g). The land grants went to neither individual Natives, tribes, nor other Native organizations such as Indian Reorganization Act entities. Rather, Congress required the formation of regional and village, state law, "business for-profit" corporations which would take title to land and receive the settlement funds. 43 U.S.C.

[29] In studying this case, the court became concerned over the role, if any, that the congressional extinguishment of claims might have with respect to a claim of Indian Country. Supplemental briefing was requested and received. The court is now satisfied that no issue in this case is resolved by section 1603(c). The Tribal Government does not and could not successfully claim the area in question to be Indian Country based upon aboriginal title. Section 1603(c) extinguishes all direct claims "against . . . the State . . . based on claims of aboriginal right, title, use, or occupancy of land. . . ." Not so clear was the question of whether section 1603(c) extinguished the Tribal Government's claim of Indian Country based upon 18 U.S.C. § 1151(b). Section 1603(c) also extinguished "[a]ll claims against . . . the State . . . based on any statute . . . relating to Native use and occupancy. . . ." The court has concluded that although 18 U.S.C. § 1151(b) defines Indian Country, it is in substance part of a jurisdictional statute. Section 1151(b) does not deal directly with the subject of who may use or occupy land. Section 1603(c) did not extinguish the claim of the Tribal Government that its lands are Indian Country.

§§ 1606(d), 1607(a).[30] Somewhat oversimplified, the regional corporations took fee title to the bulk of the land and ownership of the subsurface of village lands. Village corporations took surface title only to the lands immediately surrounding the village.

Also as a part of the statutory reorganization of the relationship between the federal government and Alaska Natives, Congress revoked all reservations in Alaska, whether created by Congress or the Executive Branch, with the exception of that on Annette Island for the Metlakatla Indian community. 43 U.S.C. § 1618(a).[31] ANCSA does, however, contain a special provision applicable to Alaska Natives whose reservations were revoked. By section 1618(b), ANCSA permitted members or stockholders of village corporations which previously had the benefit of a reservation to vote that their *corporation* take fee title to the former reservation lands. As discussed in somewhat more detail in a following section of this decision, Arctic Village and the Native Village of Venetie formed village corporations and their shareholders voted to take fee title to the former Chandalar Reservation in lieu of other ANCSA benefits.

This foregoing corporate model for a resolution of Native land claims was, of course, a dramatice departure from prior Indian settlements approved by Congress. Although some have apparently viewed ANCSA as a termination act, the court shares the view of the Secretary of the Department of the Interior who has opined that ANCSA is not "a termination statute that forecloses the exercise of all governmental powers by Native villages." [32] Rather, ANCSA is a new Native self-determination act.

[30] Villages were permitted to choose between "business for profit or nonprofit" state law incorporation. 43 U.S.C. § 1607(a).

[31] In a parallel provision, 43 U.S.C. § 1617(a), the Indian Allotment Act was repealed as to Alaska, except as to pending allotment applications.

[32] Op. Solic. Dep't Interior, M-36975 (Jan. 12, 1993) at 101; 104.

Whereas a prior termination effort sought to scatter Indians and Indian land holdings by allotting out reservations to individuals, the corporate settlement model leaves Alaska Natives with collective control of their lands and what should be done with them. That control is by and large in the hands of a board of directors, a management group made up from the Native communities themselves who must exercise collective judgment as to how to deal with the land grants and money. The federal government no longer has any right or responsibility for the active supervision of Alaska Natives with respect to the lands which they occupied after extinguishment of aboriginal titles. The court finds that this corporate model effects a significant diminution of the power of Congress and the Executive agencies over Alaska Native tribes.

There is more. In addition to setting up a structure which largely freed Alaska Natives from congressional and Executive agency dominance as regards land and money, Congress was quite explicit in stating its policy reasons for choosing the mode of settlement which was effected. In ANCSA, Congress has found and declared that:

> [T]he settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska.

43 U.S.C. § 1601(b).

Several aspects of the foregoing policy declaration are most pertinent to this court's analysis of the relationship

between the federal government (Congress in particular) and Alaska Native tribes. Firstly, Congress sought to maximize the participation of Natives in decisions affecting their rights and property. This strongly suggests a shift from government superintendence to self regulation. This declaration of policy suggests tribal independence, not dependence. Secondly, Congress negated the establishment of permanent, racially defined institutions. This, too, bespeaks the intent of Congress to draw back from its historic role of adopting substantial legislation under the Indian Commerce Clause. U.S. Const. art. I, § 8, cl. 3. As a legal entity or person, corporations are race neutral. Tribes are by definition race oriented. Thirdly, the policy declaration disowns the reservation system which had been the centerpiece of the relationship between Congress and Indian tribes since the middle of the 19th century. Finally, and perhaps most notable, Congress expressly declared its intention not to have an ongoing "wardship or trusteeship" relationship with Alaska Native tribes. In very simple terms, a "ward" is, "[a] person, especially a child, or incompetent, placed by the court under the care of a guardian." *Black's Law Dictionary* 1420 (5th ed. 1979). In terms of Indian law, Indian people and tribes have long been considered incompetent to manage their own affairs and property without the superintendence of Congress and Executive Branch agencies. By the foregoing declaration of policy, Congress has clearly said, no more! Congress now means for Alaska Natives to have "maximum participation . . . in decisions affecting their rights and property . . . without . . . [a] wardship or trusteeship." 43 U.S.C. § 1601(b).

It is been pointed out that ANCSA does not once mention the term "Indian Country." The court supposes, but does not know because the legislative history of ANCSA is uninstructive, that Congress deliberately, and no doubt for political reasons, left unresolved the Indian Country question which the court now decides. That

the Indian Country issue was not expressly resolved by ANCSA does not detract from the fact that ANCSA unmistakably affects the balance of power (the degree of dependence and superintendence) in the relationship between the federal government and Native tribes: and Congress is presumed to have known that it was affecting that relationship by the adoption of ANCSA.[33]

Other congressional acts, both pre-dating and post-dating ANCSA, have relevance to the court's appraisal of the degree of dependence and/or superintendence which

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[33] It is appropriate to here observe that when Congress revisited the Settlement Act for purposes of the Alaska Native Claims Settlement Act amendments of 1987, Pub. L. No. 100-241, Feb. 3, 1988, 100 Stat. 1788, it exercised great care to make it clear that the amendatory act was not to tilt the scale one way or the other as regards the Indian Country issue. Section 17 of the amendments act provided that:

> (a) No provision of this Act (the Alaska Native Claims Settlement Act Amendments of 1987) . . . shall be construed to validate or invalidate or in any way affect—
>
> (1) ...
>
> (2) any assertion that Indian country (as defined by 18 U.S.C. 1151 or any other authority) exists or does not exist within the boundaries of the State of Alaska.

Pub. L. No. 100-241, § 17(a), Feb. 3, 1988, 101 Stat. 1814. The published legislative history on the amendments of 1987 further underscore the intent of Congress that, "[t]his is an issue which should be left to the courts in interpreting applicable law and that these amendments should play no substantive or procedural role in such court decisions." S. Rep. No. 201, 100th Cong., 1st Sess. 23 (1987), *reprinted in* 1987 U.S.C.C.A.N. 3269, 3274. Similarly, the House of Representatives' explanatory statement with respect to the amendments of 1987 indicate an intention that the amendments "should be scrupulously neutral" on the question of tribal powers or self government. H.R. Explanatory Statement, 100th Cong., 1st Sess. 1 (1987), *reprinted in* 1987 U.S.C.C.A.N. 3269, 3299.

Clearly, Congress understood that this court would in the first instance decide the Indian Country issue based on all of the pertinent facts. This court is not, however, to be influenced in that decision by reason of Congress having amended ANCSA.

exists now as between the federal government and Alaska Native tribes.

Firstly, as to Alaska and a relatively few other states, Congress has made special provision for state civil and criminal jurisdiction with respect to Indians. In 1958, the Territory of Alaska was added to California, Minnesota, Nebraska, Oregon and Wisconsin as jurisdictions in which 28 U.S.C. § 1360 would have application. Under section 1360(a),

> Each of the States listed in the following table [which includes Alaska] shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State.

Similarly, 18 U.S.C. § 1162(a) provides in pertinent part:

> Each of the States or Territories listed in the following table [which again included Alaska as of 1958] shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.

Thus, even if this court were to conclude that the lands of the Neets'aii Gwich'in were Indian Country, Congress had long before the adoption of ANCSA determined that there was no need in Alaska to protect Alaska Natives

from the imposition of state civil and criminal law. The evidence shows that Village Public Safety Officers and Alaska State Troopers, not federal authorities, provide law enforcement in the area at issue here. In Alaska, there is not and, since 1958, has not been the exclusivity of protection for Alaska Natives under the jurisdiction of federal authorities that previously existed and still exists in many of the western states as to Indians.

In 1980, Congress adopted the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3101. ("ANILCA")[34] Pertinent to the matter before this Court, title VIII of ANILCA, 16 U.S.C. § 3111, made extensive provision for subsistence hunting and fishing rights in Alaska. In enacting ANILCA, Congress invoked both its "constitutional authority over Native affairs" as well as its "constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on public lands by *Native* and *non-Native* rural residents" of Alaska. 16 U.S.C. § 3111(4). The court emphasizes here that the subsistence hunting and fishing rights were enacted in a fashion true to the declared policy of ANCSA that Congress would in the future avoid the creation of racially defined institutions. ANILCA was enacted for the benefit of all rural Alaskans, not just Native Alaskans.[35]

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[34] ANCSA contemplated that there would be an Alaska lands act, the matter sometimes being referred to as the "D2" legislation. 43 U.S.C. § 1616(d)(2). Congress worked on the D2 legislation almost continuously from the enactment of ANCSA until the legislation was completed in 1980.

[35] The court does not mean to suggest that Congress has, since the adoption of ANCSA, evidenced an intention to abandon totally its Article I, Section 8 constitutional power to legislate with respect to Alaska Natives. Subsequent to the enactment of ANCSA, Congress has also had occasion to adopt or amend other federal laws for the benefit of Indians and has extended those laws to Alaska Natives. For example, the Indian Child Abuse and Family Violence Prevention Act, 25 U.S.C. § 3201, *et seq.*, is made applicable in Alaska by expansion of the definition of the term "Indian Reservation" for purposes of this Act to include among other entities, "village corporations under the provisions of the Alaska Native Claims Settlement Act. . . ." 25 U.S.C. § 3202(9). By contrast, the Indian Land Consolidation Act, 25 U.S.C. § 2201, *et seq.*, unmistakably omits ANCSA corporation lands from that Act. 25 U.S.C. § 2201.

As discussed previously, the evidence shows that the village corporations created by Arctic Village and the Native Village of Venetie conveyed their ANCSA lands to the Native Village of Venetie Tribal Government. The latter now contends that the tribe's lands have become subject to federal government control by virtue of the prohibition upon alienation contained in 25 U.S.C. § 177.[36] Assuming without deciding that the lands in question may be subject to a restraint on alienation, that circumstance is most certainly not controlling on the superintendence issue; and it is not even significant evidence of a reassertion of such superintendence. The conveyance from the ANCSA village corporations to the tribe was not joined in nor approved by the federal government. The title transfer was the voluntary act of the corporations. The Tenth Circuit Court of Appeals rejected just such an argument in *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d at 1076. In *Buzzard*, land acquired by the tribe in fee but subject to a tribal charter provision which prohibited disposition of land without approval of the Secretary of the Department of the Interior was held not to amount to the kind of "active involvement of the federal government" required for "superintendence" as that term is employed in *Potowatomi* and *John*. *Id.* Also apposite to the instant case, the court in *Buzzard* observed that the tribe there had acquired the land "unilaterally". *Id.* As hereinabove discussed, the focus of the court in *Buzzard* and by this court

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[36] *See also* 25 U.S.C. § 476 and the Corporate Charter of the Native Village of Venetie, Trial Exhibit 20, Charter documents at 1, § 5.

is upon what Congress and the Executive agencies have imposed by way of superintendence of Natives. Superintendence cannot be imposed or created by the tribe.

Finally, this court is not unmindful of an earlier, unpublished decision of this court in *Chilkat Indian Village v. Johnson*, Order of October 9, 1990, Case No. J84-0024 CV, Clerk's Docket No. 257. The *Chilkat* situation was not markedly different from that presented by the Tribal Government in this action.[37] This court held the Chilkat Indian Village to be a dependent Indian community. In discussing the declaration of policy of ANSCA, the *Chilkat* decision observed that:

> While the preamble speaks to a desire not to *establish* certain rights, nothing in the preamble indicates a "clear and plain" intention to *extinguish* Chilkat Indian Village's dependent status as it existed prior to the passage of ANCSA.

Chilkat, Opinion at 15 (emphasis in original).

Chilkat did not employ the detailed factual analysis called for by *Native Village of Venetie v. Alaska*, 856 F.2d at 1391. The question now before the court is not whether the declaration of policy contained in ANCSA in and of itself extinguished tribal dependency. Rather, considering all of the evidence as to the factors relevant to the dependent status issue, we inquire as to whether or not the totality of those circumstances are such as to

[37] The Chilkat Indian Village lands were originally a reservation, title to which was obtained by ANCSA village corporation Klukwan, Inc., pursuant to 43 U.S.C. § 1618(b). By amendments to ANCSA, Congress overruled the election to take title to the reservation in preference to other ANCSA rights. Congress allowed the Native Village of Klukwan to make land selections as generally permitted by ANCSA on the condition that Klukwan, Inc. would quitclaim the former reservation lands to the Indian Reorganization Act entity, Chilkat Indian Village. 16 U.S.C. § 1615 (d) (1). *See also* S. Rep. No. 1170, 94th Cong., 2d Sess. 3 (1976), *reprinted in* 1976 U.S.S.C.A.N. 4285, 4287.

constitute the tribe as one subject to federal government superintendence which is so pervasive as to evidence an intent by the federal government to be the dominant political institution in the area claimed to be Indian Country.

On the evidence produced at the trial of this case, and for the reasons discussed above, this court now finds that the Neets'aii Gwich'in, although a tribe, are not a dependent Indian community. The federal government no longer exercises that level of active superintendence necessary to evidence an intent to be the dominant political institution in the area in question to the exclusion of the state.

Extent to Which the Area was Set Aside for the Use and Occupancy of Alaska Natives

As the foregoing discussion has perhaps suggested, the differentiation between federal superintendence of a tribe and the question of whether land has been set aside for the tribe as such is a bit artificial. The two subjects are closely related. The court has separated the discussion by and large to bring into focus its conclusion that the issue of superintendence as discussed above has to do with the relationship between the federal government and the tribe, not the position of the federal government with respect to land only.

The Neets'aii Gwich'in have inhabited the lands in the vicinity of the Chandalar River since before recorded history. The Neets'aii Gwich'in, through their I.R.A. Council, obtained a reservation in 1943.[38] Unquestionably, this land was set aside for the Neets'aii Gwich'in as Native people.

As we have found above, this set-aside of land no longer exists; for the Chandalar Reservation was revoked by ANCSA. The land was in essence reclaimed by the federal government free of the reservation. That same

[38] Trial Exhibit 27.

land was in due course conveyed away not to an Indian tribe, not to an I.R.A., and not to individual members of the tribe. Rather, through ANCSA, Congress required that Native people form corporations and it was to two such corporate entities that Congress directed the land in question to be conveyed as a part of the congressional settlement of aboriginal land claims with Alaska Natives.

Being dissatisfied with the corporate mode of dealing with their land, the residents of Arctic Village and the Native Village of Venetie as shareholders of those village corporations voted to transfer their land to the Native Village of Venetie Tribal Government The land was in fact transferred and the ANCSA village corporations were dissolved.[39] The lands in question are now owned in fee by the Native Village of Venetie Tribal Government. These lands are not subject to any trust arrangement for the benefit of the Tribal Government.[40] The federal government has no ownership interest whatever in the lands which are here claimed to be Indian Country.

The court finds that by conveying unrestricted fee title to settlement lands to the Neets'aii Corporation and Venetie Indian Corporation, the federal government through ANCSA intended and in fact effected "maximum participation by Natives in decisions affecting their rights and property". 43 U.S.C. § 1601(b). By instituting a corporate model for the settlement, Congress chose a racially neutral form of ownership. This court finds that the conveyance of lands by the federal government to village business corporations was not intended to be and in fact was not a set-aside of lands "for the use of Indians

[39] Trial Exhibits 106, 117. These village corporations were business as opposed to non-profit corporations.

[40] There was testimony that the village corporations endeavored to return their land to trust status with the federal government. That proposition was rejected by the Solicitor of the Department of the Interior on the basis of ANCSA. Trial Exhibit 102.

as such. . . ." *John*, 634 U.S. at 649 (emphasis added). The court is not aware of any court having ever held that a government patent conveying fee title to a corporate entity (even one controlled by Indians) constituted a set-aside for Indians as such.[41] The Native Village of Venetie Tribal Government had the right to acquire the land in question from the village corporations; but that unilateral decision of those corporations and the tribe (both of which are controlled by the Neets'aii Gwich'in) did not constitute "action . . . by the federal government indicating that it set aside the land for use by the . . . [tribe as such]." *Buzzard*, 992 F.2d at 1076. The lands of the Neets'aii Gwich'in do not meet the set-aside factor necessary to support a finding that the Neets'aii Gwich'in are a dependent Indian community.

Conclusion

In summary, this court finds that the lands of the Neets'aii Gwich'in have not been set aside for Alaska Natives, as such, under the superintendence of the federal government. The court concludes that the Neets'aii Gwich'in, although a tribe, are not a dependent Indian community for purposes of 18 U.S.C. § 1151(b).

Based upon the court's above findings, this court concludes that the lands of the Neets'aii Gwich'in are not Indian Country; and, therefore, the Tribal Government does not have the power to impose a tax upon non-members of the tribe such as the plaintiffs.

DATED at Anchorage, Alaska, this 2nd day of August, 1995.

/s/ [Illegible]
United States District Judge

[41] While this court thinks the Tenth Circuit would decide Martine differently today, even that case involved a tribe acquiring fee land from third parties which was adjacent to Indian Country—an extant reservation. The Tribal Government in our case occupies no Indian Country whatsoever if the land it obtained from the village corporations is not Indian Country.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. F86-0075 CIV (HRH)

NATIVE VILLAGE OF VENETIE I.R.A. COUNCIL, *et al.*,
Plaintiffs,

vs.

STATE OF ALASKA, *et al.*,
Defendants.

No. F87-0051 CIV (HRH)
(consolidated)

STATE OF ALASKA, *ex rel.*,
YUKON FLATS SCHOOL DISTRICT
UNALAKLEET/NEESER CONSTRUCTION JV, *et al.*,
Plaintiffs,

vs.

NATIVE VILLAGE OF VENETIE TRIBAL
GOVERNMENT, *et al.*,
Defendants.

ORDER
(Decision—Tribal Status)

An Indian tribe is a sovereign entity. It is entitled to regulate tribe members. *Montana v. United States*, 450 U.S. 544, 564 (1981). Within Indian country, a tribe often retains the power to regulate third parties as well as its members. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152 (1980).

In these consolidated cases, the court deals with two specific government-to-government conflicts between the Native Village of Venetie I.R.A. Council,[1] *et al.* and the Native Village of Venetie Tribal Government, on the one hand, and the State of Alaska on the other hand. The Venetie Council claims the right to exercise jurisdiction over the residents of Venetie, Alaska, with respect to adoptions.[2] The Tribal Government sought to impose a gross receipts tax upon a construction contractor employed by the State of Alaska to build a school in Venetie.[3] Thus, the court has one case raising a question of the power of the Venetie Council over its own people and another raising a question of the power of the Tribal Government over third parties. The former dispute raises an issue as to the tribal status; and the latter raises both the question of tribal status and the question of whether the lands of the Tribal Government are Indian country.

This pair of questions—tribal status and Indian country—have nagged at American government generally since the American Revolution and the formation of the federal government in 1789. For Alaska, the issue of the

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[1] Hereinafter, when the court refers to "Venetie" and "Arctic Village", the court means to have reference to the town sites of Venetie or Arctic Villege and/or the people of those communities. By "Venetie Council", the court refers to the plaintiff, Native Village of Venetie I.R.A. Council. By "Tribal Government", the court refers to defendant, Native Villege of Venetie Tribal Government.

[2] Plaintiffs' Complaint, ¶ 8, and Complaint Exhibit 1, Clerk's Docket No. 1, case F86-0075 CV.

[3] Plaintiffs' Complaint, ¶ 1, Clerk's Docket No. 100, case F87-0051 CV.

status of "native tribes" has its origins in the Treaty of Cession with Russia which provided in Article III:

> The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

Ratified May 28, 1867, and Proclaimed June 20, 1867, 15 Stat. 539, 542. As we shall see in this discussion on tribal status, and in a subsequent decision on Indian country, Congress has never fully dealt with the question of the status of native groups in Alaska. Not until after Atlantic Richfield Company discovered a huge oilfield on Alaska's "north slope" of the Brooks Range and native groups blanketed the proposed right-of-way for a trans-Alaska oil pipeline with claims of aboriginal ttile, did Congress take direct action aimed at resolving the question of the status of the aboriginal inhabitants of what came to be the state of Alaska.

In 1971, Congress adopted the Alaska Native Claims Settlement Act (ANCSA).[4] ANCSA abolished all aboriginal titles in Alaska,[5] and abolished all but one of the very few Indian reservations that then existed in Alaska[6] as a part of a settlement of the native land claims which

[4] 43 U.S.C. § 1601.

[5] 43 U.S.C. § 1603.

[6] 43 U.S.C. § 1618(a).

blocked the granting of a right-of-way for the construction of the trans-Alaska pipeline. In ANCSA, Congress did only what had to be done in order to free land for the pipeline corridor. Congress did not then address, and has not since resolved, the issue of tribal status or Indian country in Alaska. Rather, these important issues have been relegated to this court which, unlike Congress, cannot legislate—cannot say *what should be*. Thus it is that the court undertakes to determine *what is* the tribal status of native groups in Alaska. This opinion constitutes the court's decision with respect to the tribal status of the residents of Venetie and Arctic Village, Alaska. A subsequent opinion will address the question of whether or not Venetie and Arctic Village, and their environs, are Indian country.

I. Case History

Venetie and Arctic Village are located at the southern edge of the Brooks Range in north-central Alaska. Venetie is situated on the banks of the Chandalar River, some 30 miles above the confluence of the Chandalar and Yukon Rivers. Arctic Village lies to the north, on the banks of the East Fork of the Chandalar River, a few miles downstream from where it emerges out of a deep valley in the Brooks Range. Fort Yukon is located on the Yukon River, some 70 air-miles southeast of Venetie.

A. The Adoption Case

The Native Village of Venetie I.R.A. Council, the Native Village of Fort Yukon I.R.A. Council, and private individuals commenced case F86-0075 CV for purposes of testing the legal enforceability of orders for adoption of children entered by the village courts of Venetie and Fort Yukon ("Adoption Case").[7] State officials had declined to acknowledge village adoption orders for purposes of the issuance of substitute birth certificates and aid to families with dependent children ("AFDC") benefits.

[7] Clerk's Docket No. 1, case F86-0075 CV.

Plaintiff Nancy Joseph is an Athabascan Indian from the Native Village of Fort Yukon. One of Joseph's relatives, an expectant mother, asked Joseph to adopt her baby following the child's birth. Joseph agreed, and took the child home from the hospital shortly after his birth on February 24, 1986.

Inasmuch as the child's natural mother was from Venetie, she consented to the adoption in Venetie's tribal court. Joseph subsequently requested a substitute birth certificate from the State of Alaska showing her to be the child's mother. The Bureau of Vital Statistics of the State of Alaska denied the request, stating that its policy was to not recognize native or tribal council adoption orders.

In June, 1986, Joseph applied for AFDC benefits. On October 20, 1986, the Division of Public Assistance denied her application because it did not recognize the adoption of her child. She was directed to reapply if she could provide proof that the State of Alaska had recognized the adoption.

On May 13, 1988, Judge Kleinfeld published a lengthy decision in the Adoption Case, 687 F.Supp. 1380 (D. Alaska 1988). Deciding cross-motions for summary judgment, Judge Kleinfeld held that the Eleventh Amendment did not bar the Adoption Case, that village courts did not have exclusive jurisdiction of adoption matters under the Indian Child Welfare Act, 25 U.S.C. § 1918, *et seq.*, and that village courts could not exercise concurrent jurisdiction over adoptions due to the fact that they had not petitioned for nor received authority to resume jurisdiction over adoption matters. The State's motion for summary judgment was granted and the plaintiffs' complaint dismissed. The plaintiffs appealed.

Of importance to the matter now before the court in the Adoption Case, the Ninth Circuit Court of Appeals held that:

> [A]n Indian tribe need not wait for an affirmative grant of authority from Congress in order to exercise dominion over its members.

Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 556 (9th Cir. 1991).[8] The Ninth Circuit Court also held that:

> In accordance with this doctrine of inherent tribal sovereignty, it follows that Indian groups to be recognized as sovereigns should be those entities which historically acted as bodies politic, particularly in the periods prior to their subjugation by non-natives. There is, however, an additional prerequisite that an Indian group must meet in order to achieve present-day recognition as a sovereign: the modern-day group must demonstrate some relationship with or connection to the historical entity. . . . "[T]ribal status is preserved," we held, "if some defining characteristic of the original tribe persists in an evolving tribal community." [*United States v. State of Washington*, 641 F.2d 1368 (9th Cir. 1981)] at 1372-73.
>
> This requirement has been interpreted liberally in favor of Indian groups. "[C]hanges in tribal policy and organization attributable to adaptation do not destroy tribal status." *Id.* at 1373. We have been particularly sympathetic to changes wrought as a result of dominion by non-natives. . . . In general, we have continued to recognize tribal existence unless the tribe has voluntarily sought, and achieved, assimilation into non-Indian culture. *See State of Washington*, 641 F.2d at 1373.

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[8] The Ninth Circuit Court had rendered an earlier decision, *Native Village of Venetie I.R.A. Council v. State of Alaska*, 918 F.2d 797 (9th Cir. 1990), which opinion was withdrawn upon issuance of the September 12, 1991, decision. Part II-B of this earlier opinion was revised to reflect an intervening decision of the United States Supreme Court with respect to the Eleventh Amendment issue. *Blachford v. Native Village of Noatak*, 501 U.S. 775 (1991).

Id. at 557. Summing up the foregoing, the Ninth Circuit Court held:

> Indian sovereignty flows from the historical roots of the Indian tribe. . . . Thus, to the extent that Alaska's natives formed bodies politic to govern domestic relations, to punish wrongdoers, and otherwise to provide for the general welfare, we perceive no reason why they, too, should not be recognized as having been sovereign entities. If the native villages of Venetie and Fort Yukon are the modern-day successors to sovereign historical bands of natives, the villages are to be afforded the same rights and responsibilities as are sovereign bands of native Americans in the continental United States.
>
> We cannot say on this record, however, whether the predecessors of the native villages of Venetie or Fort Yukon formed such bodies politic. Nor can we say whether Venetie or Fort Yukon can sufficiently trace their origins to such an identifiable historical sovereign that it should be considered the modern-day successor to such an entity. Answers to these questions must be provided, in the first instance, by the district court.

Id. at 558-9 (citations omitted) (footnotes omitted).[9]

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[9] Relevant to this court's decision to render separate opinions on the tribal status and Indian country issues which are before the court, Judge O'Scannlain observed in a footnote to the first paragraph quoted above that, "tribal sovereignty is not coterminous with Indian country. . . . Rather, tribal sovereignty is manifested primarily over the tribe's members. . . . A tribe's authority over its reservation or Indian country is incidental to its authority over its members." *Native Village of Venetie*, 944 F.2d at 558-59 n.12 (citations omitted). In the interest of advancing the Adoption Case, which involves only potential tribal power with respect to tribal members, the court has decided to issue two separate opinions, one on the issue of tribal status and the other on the issue of Indian country.

The Ninth Circuit Court reversed that part of the district court decision granting the State's motion for summary judgment and directed that:

> On remand, the district court must determine whether the native villages of Venetie and Fort Yukon are the modern-day successors to an historical sovereign band of native Americans. If the district court determines that either village is a successor to such a sovereign, it must provide the relief necessary to ensure that the state of Alaska affords full faith and credit to adoption decrees issued by the tribal courts of the native village.

Id. at 562.

B. The Tax Case

The State of Alaska, on behalf of the Yukon Flats School District and others, commenced case F87-0051 CV seeking declaratory and injunctive relief challenging the jurisdiction or authority of the Native Village of Venetie Tribal Government, *et al.* to impose and collect taxes ("Tax Case").[10] The Tribal Government had enacted and imposed a gross receipts tax upon construction activities in connection with the building of a school at Venetie, Alaska.

In the Tax Case, Judge Kleinfeld granted a preliminary injunction preventing assessment and collection of the gross receipts tax. Here also, there was an appeal, in this instance by the Native Village of Venetie, *et al.*.[11] The Ninth Circuit Court rejected Venetie's contention that its reorganization under the Indian Reorganization Act

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[10] Clerk's Docket No. 1, case F87-0051 CV.

[11] An Amended Complaint subsequent to the appeal substituted the Tribal Government as lead defendant in place of Venetie and its council in recognition of the fact that the tax in question was the act of the Tribal Government, not the Venetie Council. Clerk's Docket No. 100, case F87-0051 CV.

("IRA") was conclusive evidence of Venetie's tribal status. *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1387 (9th Cir. 1988) (hereinafter "*Venetie I*"). The court then observed, significantly in terms of future developments in the case, that:

> If the IRA does not settle the matter, the inquiry would shift to whether Native Village or [sic] Venetie has been otherwise recognized as a tribe by the federal government. Failing there, tribal status may still be based on conclusions drawn from careful scrutiny of various historical factors.

Id. at 1387 (citations omitted). After discussing other pertinent issues, the Ninth Circuit Court affirmed the grant of a preliminary injunction in the Tax Case.

With both cases returned to the district court, an order of consolidation [12] for trial of the "tribal status issues" [13]

[12] Clerk's Docket No. 65, case F86-0075 CV. The order consolidating the Adoption Case and the Tax Case provided that trial on the tribal status questions with respect to the Native Village of Fort Yukon would be taken up at a later date, after resolution of the tribal status issues with respect to Venetie.

[13] It is clear from a Joint Statement of Issues filed October 1, 1993, Clerk's Docket No. 95, case F86-0075 CV, that all of the parties understood that the court would try both the issue of tribal status and the Indian country issue. The Joint Statement of Issues also provided that the court was to try the issue of whether the Venetie Council exercised child custody authority over tribal members. Joint Statement of Issues at 2, ¶ 5.

The Joint Statement of Issues also, in substance, provided that certain issues will not be decided as a consequence of the now-concluded trial. The court does not here decide whether the Venetie Council or the Tribal Government have been divested of any sovereign powers by federal law or necessary implication of dependent status. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980). The court also does not here decide whether the Venetie Council or Tribal Government must prove the extent of its powers over non-members in this court nor (what is the converse of the foregoing) whether the State of Alaska must exhaust tribal court remedies prior to any challenge of tribal powers in this court.

was, in due course, entered. Trial was commenced on November 1, 1993, and concluded on November 5, 1993. By agreement of the parties, written briefs were filed in lieu of closing arguments.

II. Tribal Status

The question to be resolved is whether the present residents of Arctic Village and Venetie and environs are a sovereign Indian tribe.[14] In accordance with well-established law, the Ninth Circuit Court held in *Native Village of Tyonek v. Puckett*, 957 F.2d 631 (9th Cir. 1992), that an Indian community constitutes a sovereign tribe if it can show that (1) it is acknowledged [15] as such by the federal government, or (2) it satisfies the traditional common-law definition of a tribe. *Id.* at 635. That definition, quoted by the Ninth Circuit Court from *Montoya v. United States*, 180 U.S. 261, 266 (1901), is as follows:

[14] In this decision, the court uses the term "sovereign tribe" to refer to native groups which are entitled to a government-to-government relationship with the United States. (Such tribes are sometimes referred to in Indian law literature as historic tribes.) In so doing, the court intends to distinguish historic or sovereign tribes from those native entities which are designated by statute as tribes for purposes of the benefits provided by Congress. *See, e.g.*, the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450b(e).

[15] Older literature and cases on the question of tribal status speak of a tribe being "recognized" by the federal government. In adopting federal regulations (25 C.F.R. § 83) with respect to tribal status, the Department of Interior employs the terms "recognized" and "acknowledged" interchangeably. William W. Quinn, *Federal Acknowledgement of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83*, 17 Am. Indian L. Rev. 37 n.4 (1992) (hereinafter "*Authority, Judicial Interposition*"), suggests use of the term "acknowledge" or "acknowledgment" since, in his view, "these terms more accurately reflect the ethnohistorical reality of the United States' acknowledging the existence of an extant and continuously surviving American Indian polity." The court here does likewise with the caveat that it views the terms as being substantially interchangeable in terms of legal effect.

> [A] body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory. . . .

Additionally, in *Tyonek* as well as the earlier Ninth Circuit Court decision in this case, the modern definition of sovereign tribal status also requires proof that:

> [T]hey are "the modern-day successors" to historical sovereign entity that exercised at least the minimal functions of a governing body. *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 559 (9th Cir. 1991).

Tyonek, 957 F.2d at 635.

The proof at trial was directed to the factual inquiry required by the common law, *Montoya*, test for tribal status. However, the Venetie Council and the Tribal Government contend in their opening post-trial brief that recent action by the Bureau of Indian Affairs ("BIA") removes all doubt that they have been acknowledged by the federal government as a sovereign tribe. Both theories were designated as issues for trial [16] and both approaches will be addressed in this order.

A. Federal Acknowledgement

Like virtually all aspects of Indian law, federal acknowledgement of Indian tribes has had a tangled history.

Until the late nineteenth century, tribal acknowledgement was primarily made on an ad hoc basis through individual treaties. William W. Quinn, *Federal Acknowledgement of American Indian Tribes: The Historical Development of a Legal Concept*, 34 Am. J. Legal History 331, 333-47 (1990) (hereinafter "*Historical Development*"). From 1778 through 1871, the United States entered into 372 treaties with Indian tribes. *Id.* at 339. The definition of acknowledged Indian tribes prior to

[16] Clerk's Docket No. 95 at 2, ¶ 1, at 4, ¶ 1, case F86-0075 CV.

1871 was essentially those with treaties. *Id.* at 347. From early in American history, the Supreme Court deferred the issue of whether the tribe in question was federally acknowledged to the "political departments of the government," i.e., the Executive Branch and Congress, stating that "[i]f by them those Indians are recognized as a tribe, this court must do the same." *U.S. v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865).

Congress ended the treaty-making era in 1871, 25 U.S.C. § 71. Thereafter, the BIA and Congress were confronted with the problem of how to classify and deal with numerous Indian tribes in the western states with no treaty relations between them and the United States. Some new criterion would have to be adopted to determine which tribes would be provided services. *Historical Development* at 347. In 1916, the BIA received its first formal request of this century for federal acknowledgement, but it was clear at that time that the BIA had no policy as to which tribes were federally acknowledged and which were not.[17] *Id.* at 354.

[17] For many years after 1871, Congress' practice was to include, in statutes aimed at Indians, definitions of "tribe" for purposes of each statute. Congress' practice has been to delegate the responsibility for determining the beneficiaries of the legislation to the Department of Interior. L.R. Weatherhead, *What is an "Indian Tribe?"—The Question of Tribal Existence*, 8 Am. Indian L. Rev. 1, 2-15 (1980). Consequently, Congress generally uses substantially the same definition of tribe in each act.

With minor variations, the boilerplate definition typically used was:

> "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

See the Indian Self-Determination Act, 25 U.S.C. § 450b(e); the Indian Civil Rights Act, 25 U.S.C. § 1301(1); the Indian Economic Development Act, 25 U.S.C. § 1452(c); the Indian Health Care Act, 25 U.S.C. § 1603(d); the Tribal Community Colleges Act, 25 U.S.C. § 1801(2); and the Indian Child Welfare Act, 25 U.S.C. § 1903(8).

The Indian Reorganization Act of 1934 used the term "recognition" for the first time in a jurisdictional sense. Only Indian tribes that were acknowledged would be provided with services and dealt with in trust relationships. A list of 258 tribes was made of all those eligible to participate in voting to reorganize under the Act. *Id.* at 356. Aware that there were many Alaska Native groups that had not previously been acknowledged, but that might be eligible to reorganize under the Act, the BIA promoted the enactment of the Alaska Reorganization Act of 1936. This Act established some criteria for the purposes of determining which Alaska Native groups were eligible to reorganize.[18]

Throughout the 1930s and 1940s, many Indian entities petitioned the Department of Interior for recognition. The BIA and the Solicitor of the Department of Interior issued a stream of opinions acknowledging, or declining acknowledgement of, these purported tribal entities. *Historical Development* at 358-9. Following two circuit court cases that conditioned important tribal rights on federal acknowledgement, *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); and *Joint Tribal Council of the Passamaguoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), the number of petitions for federal acknowledgement on file at the BIA multiplied exponentially. Overwhelmed by the flood of petitions and faced with a court order to decide a petition by the Stilliguamish tribe within 30 days, the Department of Interior decided that it had to formalize the petition and acknowledgement process.

In 1978, the Department of Interior promulgated the Federal Acknowledgement Procedures ("FAP"), which

[18] Such criteria were "having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district . . . ." Act of May 1, 1936, ch. 254, 49 Stat. 1250 (1936).

The reader will please bear in mind that *reorganization* of Alaska Native groups and *recognition* or acknowledgement of them are two different concepts.

now govern the acknowledgement of Indian tribes. 43 Fed. Reg. 39,361 (Sept 5, 1978); 25 C.F.R. §§ 83.1-83.11 (1978). A list of acknowledged tribes was to be published annually in the Federal Register pursuant to 25 C.F.R. § 83.6(b).[19] The initial publication of the list of acknowledged tribes stated that the, "list of eligible Alaska Native entities will be published at a later date." 44 Fed. Reg. 7235 (Feb. 9, 1979). As this court has previously had occasion to observe, the subsequent lists of Alaska Native entities and the accompanying preambles were less than clear in terms of their intended effect. *Alyeska Pipeline Co. v. Kluti Kaah Native Village of Copper Ctr.*, No. A87-201 CV, Order on Motion to Dismiss and Motion for Summary Judgment, July 27, 1993, Clerk's Docket No. 180 at 24-25.

On October 21, 1993 (only two weeks before the trial in this case), the Department of Interior, through BIA, published a Notice that purported to clarify the past confusion as to Alaska Native entities. The Notice consisted of a lengthy preamble which chronicles the confusing history of the Department's use of tribal acknowledgement proceedings and the Department's publication of lists of tribes which it may or may not have acknowledged. 58 Fed. Reg. 54,364-66 (Oct. 21, 1993). It purports to contain an updated list of Alaska Native entities including the Village of Venetie, the Village of Arctic Village, and the Native Village of Venetie Tribal Government.[20] The

[19] Unless otherwise indicated, the court refers in this decision to the 1978 regulations as currently published in the Code of Federal Regulations. 25 C.F.R. Part 83 has been revised and amended 59 Fed. Reg. 9293 (Feb. 25, 1994). The new regulations require that the list be published at least every three years. 59 Fed. Reg. 9294, § 83.5(a).

[20] The Native Village of Venetie Tribal Government did not appear on any of the previous lists. The three current listings are cross-referenced as follows:

Arctic Village (See Native Village of Venetie Tribal Government)

many non-tribal, corporate, entities included in the 1988 list were deleted. In the preamble, the BIA asserts that:

> This list is published to clarify that the villages and regional tribes listed below are not simply eligible for services, or recognized as tribes for certain narrow purposes. Rather, they have the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States; are entitled to the same protection, immunities, privileges as other acknowledged tribes; have the right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities available to other tribes; and are subject to the same limitations imposed by law on other tribes.

58 Fed. Reg. 54,366 (Oct. 21, 1993).

In their opening brief, the Venetie Council and Tribal Government contended that, with publication of the Notice of October, 1993, the people of Venetie and Arctic Village were acknowledged as a tribe.[21] They contended that acknowledgement, once effected, is a political decision subject to review only for arbitrariness. They pointed out that Congress or the Executive Branch may not acknowledge as a tribe a group of people who are not a "distinctly Indian community" citing *United States v. Sandoval*, 231 U.S. 28, 46 (1913). The Venetie Coun-

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Village of Venetie (See Native Village of Venetie Tribal Government)

Native Village of Venetie Tribal Government (Arctic Village and Village of Venetie)

58 Fed. Reg. 54,368-9. It is unclear whether the Notice was intended to publicize the acknowledgement of one, two or three tribes.

[21] Venetie Council opening brief at 16-19, Clerk's Docket No. 126, case F86-0075 CV.

cil and Tribal Government argued that their tribal status was a political question subject only to review for arbitrariness. As discussed below, this argument begs the question of whether acknowledgement of a tribe has occurred for purposes of this case.

The State of Alaska argued that the Executive Branch had not recognized the Tribal Government, or any other entity in the Chandalar region, as a tribe prior to commencement of this litigation.[22] The State disputed the effect of the Notice of October, 1993. While conceding that the Secretary has general authority to interpret tribal eligibility statutes, the State contended that such authority did not extend to recognizing tribes.[23] Finally, based upon its review of extensive evidence presented at trial with respect to dealings between the BIA, on the one hand, and principally the Venetie Council and residents of Arctic Village on the other hand, the State argued that there has been no executive "recognition of the Tribal Government as a tribe."[24]

At the risk of seeming to digress, the court notes that the Notice first came to the attention of the court and the

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[22] State of Alaska opening brief at 7-19, Clerk's Docket No. 129, case F86-0075 CV.

[23] The State argued, with reference to the FAP regulations, 25 C.F.R. Part 83, that the BIA has violated its own regulations which are asserted to be "limited to dealing with tribes in the 'continental 48 states' ". State of Alaska opening brief at 9, Clerk's Docket No. 129. This argument need not long delay us; for the State misquotes the regulation. It does not apply in the "continental 48 states"; rather, section 83.6(a) makes the FAP procedures applicable "in the continental United States". Alaska is patently a part of the North American continent. In revising the FAP regulations, the Secretary has added a definition of "continental United States", which "means the contiguous forty-eight states and Alaska." 59 Fed. Reg. 9293, § 83.1 (Feb. 25, 1994).

[24] State of Alaska opening brief at 19, Clerk's Docket No. 129, case F86-0075 CV.

parties in a related case[25] raising the same issues as the court has here. In that case, defendant Kluti Kaah Native Village of Copper Center moved for partial summary judgment and dismissal in its favor as to the issue of tribal status. The foundation for this motion was the Notice which listed the Kluti Kaah Native Village of Copper Center as one of the purportedly acknowledged Alaska Native entities. This motion was expressly not opposed by either plaintiffs or the intervenor, State of Alaska. The State, in substance, conceded that the Kluti Kaah were a tribe. The court granted the motion and dismissed Kluti Kaah Native Village of Copper Center from the case.[26] The State of Alaska now takes the position in these proceedings that the Notice did *not* effect acknowledgement of the tribal status of the people of Venetie, Arctic Village or their Tribal Government.

The court's concern over the inconsistency of positions taken by the State with respect to the effect of the Notice was overshadowed by the court's more immediate concern that the Venetie Council and Tribal Government appeared to write-off too quickly the State's contention in this case that the Secretary had no authority to administratively acknowledge tribal status. This argument, if adopted by the court, would undercut not only the Tribal Government's argument that acknowledgement was effected by the Notice but, as well, the entire FAP process. Subsidiary to this, the court was concerned that the Notice was apparently issued in favor of a host of Alaska Native entities, none of which had made application for acknowledgement under the process created in 1978 and published in 25 C.F.R. § 83. The FAP regulations seemed to the court to provide for the publication of a list of

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[25] Alyeska Pipeline Service Co., *et al.*, plaintiff, State of Alaska, intervenor-plaintiff v. Kluti Kaah Native Village of Copper Center, *et al.*, defendants, case A87-0201 CV.

[26] Clerk's Docket No. 203, case A87-0201 CV.

native groups who had gone through the FAP process. 25 C.F.R. 83.6(a) and (b). These concerns were related to the parties in an order filed May 5, 1994, requesting supplemental briefing.[27]

In responding to the question of the Secretary's authority to acknowledge tribes in Alaska, the Venetie Council and Tribal Government discuss the development of the various lists of Alaska Native groups promulgated by the BIA, citing as authority for their issuance 25 C.F.R. § 83.6(b). In so doing, they emphasize that the lists relate to "*previously* recognized tribes". Native Village of Venetie supplemental brief at 11, Clerk's Docket No. 135. They recite from the preamble to the Notice the BIA's current statement of purpose in issuing a list is:

> [T]o publish an Alaska list of entities conforming to the intent of 25 C.F.R. 83.6(b). 58 Fed. Reg. 54,365 (Oct. 21, 1993).

Venetie then states:

> Thus, the Department finally followed its own mandate to publish a comprehensive list of *previously* acknowledged tribes—a mandate that had been only partially fulfilled since 1978.

Native Village of Venetie supplemental brief at 11, Clerk's Docket No. 135 (emphasis supplied). The court was initially unsure that the foregoing words meant what they seemed to say: i.e., that the Venetie Council and Tribal Government had "previously" been acknowledged. The court's uncertainty was removed by the future statement that:

> In his application of § 83.6(b), the Secretary has finally determined which tribal entities qualify as acknowledged tribes and thus are entitled to full recognition. Recognized *tribal status was not conferred on these entities for the first time in October 1993.*

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[27] Clerk's Docket No. 134.

> Rather, these entiites have been placed on the list because the BIA determined that they had been "previously recognized and were receiving services". 25 C.F.R. § 83.6(b) (1993). Therefore, the court's inquiry is limited to determining whether the placement of a particular tribe on the list was arbitrary. *United States v. Sandoval*, 231 U.S. 28, 46 (1913).

Id. at 12 (emphasis supplied).

Plainly, the Venetie Council and Tribal Government have shifted their position in response to the court's order for supplemental briefing. They concede that the October 21, 1993, Notice and list did not effect acknowledgement of tribal status. The Venetie Council and Tribal Government now contend that they were previously acknowledged but do not specify how, when, or by what branch or agency of the government acknoweldgement was achieved.

For its part on supplemental briefing, the State reiterates its contention that the Secretary has no statutory or other authority to recognize tribes as sovereign entities.[28] Alternatively, the State contends that the Secretary has promulgated a federal acknowledgement procedure, which neither the Venetie Council nor the Tribal Government pursued. On the authority of *United States v. Nixon*, 418 U.S. 683, 694-96 (1974), the State argues that, having adopted regulations to govern a process, the Department of Interior must follow them.[29]

1. *Did the Notice effect acknowledgement?*

Based upon the initial round of post-trial briefing in this case, it was the court's supposition that a principal issue to be decided was: did the Department of Interior Notice

[28] State of Alaska supplemental brief at 1, Clerk's Docket No. 138, case F86-0075 CV.

[29] State of Alaska supplemental brief at 16, Clerk's Docket No. 138, case F86-0075 CV.

of October 21, 1993, listing Venetie, Arctic Village and the Tribal Government as tribes effect acknowledgement? As a consequence of the supplemental briefing, the issue is moot; for the Venetie Council and Tribal Government do not now make this contention. Accordingly, the court now expresses no opinion as to whether inclusion of a native entity in the Notice could effect acknowledgement of a tribe not otherwise acknowledged by Congress or the Executive Branch.

Nevertheless, the court has a case to decide and is confronted with the fact that Venetie and Arctic Village as well as the Tribal Government are named in the public Notice as acknowledged tribes. For purposes of further discussion of the tribal status issue in this case, the court will proceed with the Venetie Council and Tribal Government's supplemental argument to the effect that they were acknowledged previous to publication of the Notice.

2. *Does the Department of Interior have the power to acknowledge tribal status?*

In 1978, the Department of Interior promulgated its FAP regulations which now govern the acknowledgement of Indian tribes. 25 C.F.R. § 83.1-83.11. These regulations are a clear assertion of executive authority over the acknowledgement process. The State of Alaska contends that there is no statutory or other authority for this assertion of power.

Three statutes were cited in 1978 by the Secretary as authority for adopting the FAP regulations (25 C.F.R. Part 83). They do not expressly grant the authority claimed by the Secretary.[30]

The first statute, 5 U.S.C. § 301,[31] grants power to the head of each executive department to prescribe general

[30] *See Authority, Judicial Interposition* at 47-8.

[31] 5 U.S.C. § 301 reads in part:

> The head of an Executive department . . . may prescribe regulations for the government of his department, the conduct

housekeeping and procedural rules to manage that department. The other two statutes are 25 U.S.C. §§ 2 and 9.[32] Section 2[33], a grant of managerial authority from the Secretary of the Interior to the Commissioner of Indian Affairs (now designated as the Assistant Secretary of the Interior—Indian Affairs), is scant authority for the Secretary to establish a perpetual government-to-government relationship between an Indian entity and the federal government. Section 9[34] delegates legislative authority to the President, but limits his rulemaking authority to effecting the provisions of existing congressional acts. None of these statutes explicitly grant the Secretary the authority that he would exercise under the FAP regulations.

Nevertheless, the Supreme Court has held that congresional acquiescence to administrative practices can fix the construction of federal law. In *United States v. Midwest Oil*, 236 U.S. 459, 472-73 (1915), the court was

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of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.

[32] 25 U.S.C. § 2 (1988) is a recodification of section 463 of the *Revised Statutes*, derived from the Act of July 9, 1832, ch. 174, § 1, 4 Stat. 564, and the Act of July 27, 1868, ch. 259, § 1, 15 Stat. 228. 25 U.S.C. § 9 is a recodification of section 465 of the *Revised Statutes* and derived from the Act of July 30, 1834, ch. 162, § 17, 4 Stat. 738.

[33] 25 U.S.C. § 2 reads:

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

[34] 25 U.S.C. § 9 reads:

> The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

required to determine the existence of the President's authority to withdraw lands that had been declared open and available for disposition to private citizens. The court noted that the President "has, during the past eighty years, without express statutory,—but under the claim of power so to do,—made a multitude of Executive Orders which operated to withdraw public land that would otherwise have been open to private acquisition." *Id.* at 469. This history supported the conclusion that:

> Both officers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystalize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself, —even when the validity of the practice itself is the subject of investigation.

Id. at 472-73.

Notwithstanding any confusion over the meaning of the various lists of Alaska Native entities, it is clear that the Department of Interior has, from the beginning of the acknowledgement program in 1978, claimed to have the power to recognize Alaska Native entities for all purposes, including sovereignty. Section 83.11 of the FAP regulations reads as follows:

> Upon final determination that the petitioner is an Indian tribe, the tribe shall be eligible for services and benefits from the Federal Government available to other federally recognized tribes and entitled to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes with a government-to-government relationship to the United States as well as having the

> responsibilities and obligations of such tribes. Acknowledgement shall subject such Indian tribes to the same authority of Congress and the United States to which other federally acknowledged tribes are subject.

A plainer statement of intent could hardly be made. The Department of Interior's assumption of authority was as broad in 1978 as it is today, and includes the power to recognize Alaska Native and Indian entities as sovereign tribes. Congress has had a decade and a half in which to challenge this exercise of power. Prior to publication of the October 21, 1993, Notice, Congress had taken no action in response to the acknowledgement of over three hundred tribes by the Secretary in the last sixteen years.

Subsequent to the Notice, Congress did take some action; and it had to do with the very Notice upon which the court focuses. On November 24, 1993, Congress passed the Tlingit and Haida Status Clarification Act, Pub. L. No. 103-454, 108 Stat. 4791 (Nov. 2, 1994). In this Act, Congress expressly found that the Central Council of Tlingit and Haida Indian Tribes of Alaska were a federally recognized Indian tribe. Stripped of a lot of technicalities and qualifications, this Act, in substance, chastises the Secretary for not including the Central Council of Tlingit and Haida Indian Tribes of Alaska in the Notice. Even more to the point which the court would now make, Congress found in this Act that:

> The Secretary does not have the authority to terminate the federally recognized status of an Indian tribe as determined by Congress . . . .

Section 2, Pub. L. No. 103-454, 108 Stat. 4791 (Nov. 2, 1994). It seems highly improbable that Congress would thusly rebuke the Secretary pointing out his lack of authority with respect to terminating congressionally recognized tribes without also taking the Secretary to task for *acknowledging* tribal status if it were the view of Congress that he did not have that power.

More generally, as discussed above, the Department of Interior and, by delegation, the BIA have been processing petitions for the acknowledgement of tribes since before the turn of the century. When the Secretary promulgated the FAP regulations in 1978, he merely formalized a process exercising a power that he had been employing for decades. Congress' long acquiescence in this process indicates its recognition of the Secretary's continuing power to acknowledge tribes.

Accordingly, the court concludes that the Secretary and, by delegation, the BIA had authority to adopt the FAP regulations and have authority thereunder to acknowledge tribal status.

3. *Is the status of Venetie Council and/or the Tribal Government a political question?*

Although the Venetie Council and Tribal Government have abandoned any contention that the October 21, 1993, Notice effected their acknowledgement as a tribe, it is not clear that these parties have abandoned the contention that their status is a political question. As they have pointed out, it has long been the rule that if the political branches of the government have recognized an Indian entity as a tribe, the court must do the same. *Sandoval*, 231 U.S. at 47. However, acknowledgement decisions by the political branches are reviewable for arbitrariness. Congress, for example, cannot recognize as an Indian tribe a group of people who are not a distinctively Indian community. *Id.* at 46.

No-one in this case has contended, and there is no evidence in this case, that Congress has ever acknowledged the tribal status of the Venetie Council, Arctic Village, or the Tribal Government.

Venetie Council and the Tribal Government claim to have been acknowledged. They do not say how, nor when, nor by what agency acknowledgement was effected. The State disputes the claim of acknowledgement.

If the evidence before this court demonstrated that Congress or the Department of Interior had made a decision to acknowledge the Venetie Council or the Tribal Government, that decision would arguably be a political one, subject only to review for arbitrariness.[35] As it is, however, the Venetie Council and the Tribal Government have abandoned any claim that publication of the Notice effected acknowledgement. There is no FAP decision before the court. The parties disagree over whether the evidence produced at trial demonstrates entitlement to acknowledgement.

The court concludes that it is not confronted with a political question.

4. *Did the BIA or any other Executive agency acknowledge the Venetie Council or Tribal Government as a tribe?*

The Venetie Council was authorized and organized under the Indian Reorganization Act ("IRA"). 25 U.S.C. § 473a.[36] Venetie acquired IRA status in 1940 (Exhibit 22). As recounted by the State of Alaska at some length in its opening brief,[37] there has been significant interchange—much correspondence—between the Venetie

[35] For another view of this point, see Felix S. Cohen, *Handbook of Federal Indian Law* ch. 1, § B1 at 3 (1982).

[36] Sections 461, 465, 467, 468, 475, 477, and 479 of this title shall after May 1, 1936, apply to the Territory of Alaska: *Provided*, That groups of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 470, 476, and 477 of this title.

25 U.S.C. § 473a.

[37] State of Alaska opening post-trial brief at 10-17, Clerk's Docket No. 129.

Council as well as others, on the one hand, and the BIA, on the other hand, over the years. Neither the testimony nor the exhibits produced by any of the parties evidences a decision by the BIA to constitute Venetie or any other entity associated with it as a sovereign tribe. IRA status alone, while evidence of a village's political cohesiveness, a factor in proving common-law tribal status, is not dispositive. *Native Village of Tyonek v. Puckett*, 957 F.2d at 635.[38]

The court finds no evidence that the BIA or any other Executive Branch has ever engaged in any adjudicative process aimed at establishing the tribal status of the people of Venetie or Arctic Village. There is no evidence that the Venetie Council, Arctic Village, or the Tribal Government ever petitioned the BIA for acknowledgement under the FAP regulations. 25 C.F.R. § 83.7. The court notes in passing that this procedure for acknowledgement was in place for fifteen years prior to trial.

On January 12, 1993, the Solicitor for the Department of Interior released his legal opinion on the powers of Alaska Native villages. Governmental Jurisdiction of Alaska Native Villages over Land and Nonmembers, M-36975 (Jan. 12, 1993). In that opinion, the Solicitor discussed at great length the subject of Alaska village tribal status. *Id.* at 8, *et seq.*. In summing up the subject of the "Treatment of Native Villages by Congress", *Id.* at 46, the Solicitor observes:

> In the summer of 1990, Congress enacted legislation directing the establishment of the "Joint Federal-State Commission on Policies and Programs Affecting Alaska Natives." Act of August 18, 1990, Pub. L. No. 101-379, § 12, 104 Stat. 473, 478-83. That

[38] In *Venetie I*, 856 F.2d 1384, 1387 (1988), the Ninth Circuit Court suggested that the Alaska amendment to the original Indian Reorganization Act (25 U.S.C. § 473a), "raises doubt as to whether IRA organization should be construed [as conclusive evidence of tribal status] in the case of Alaska natives."

> Commission has a broad mandate to review public policies affecting Alaska Natives. When the Commission completes its work and files its recommendations, Congress may revisit how it deals with Alaska Native villages. For now, we cannot say that Alaska Native villages are not tribes for purposes of federal law. *We do not mean to conclude that every Native village is an Indian tribe.*[126] *Which specific Alaska Native villages are tribes is a factual determination beyond the scope of this opinion.*

Id. at 48 (emphasis supplied).[39] The court's point is this: in January of 1993, the Solicitor for the Department of Interior viewed the matter of tribal status for individual Alaska Native villages as an open question. He observed, as had the Ninth Circuit Court [40] that village tribal status depends upon the facts of each case. Ten months later, the Venetie Council and Tribal Government claim to have already been acknowledged as sovereign tribes. If the people of Venetie and Arctic Village were ever acknowledged as a tribe by the BIA, the Solicitor seems not to know of it.

The Venetie Council and Tribal Government have failed to convince the court that their tribal status has been acknowledged by the federal government. The court concludes that neither of these groups nor Arctic Village is a federally acknowledged tribe. The court turns now to the alternative common law or the *Montoya* test for establishment of sovereign tribal status.

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[39] Footnote 126 is an acknowledgment of the Ninth Circuit Court's decision in *Native Village of Venetie I.R.A. Council v. State of Alaska*, here referred to as the Adoption Case. The Solicitor observes that the Ninth Circuit Court has held that Alaska Native groups are not necessarily tribes with inherent sovereign powers over such matters as child custody.

[40] *Venetie I*, 856 F.2d at 1391.

B. Alternative Common-Law Test

The court has heretofore [41] set out the accepted common-law definition of an Indian tribe as first articulated in *Montoya v. United States*, 180 U.S. at 266. Under *Montoya*, a native group has proved sovereign tribal status if it establishes by a preponderance of the evidence that:

> (1) it is a group of Indians of the same or similar race;
>
> (2) the group is united in a community;
>
> (3) the group is under one leadership or government; and
>
> (4) the group inhabits an area of some reasonable definition.

As also set out above,[42] under *Native Village of Tyonek v. Puckett*, 957 F.2d at 635, a native group must also establish by a preponderance of the evidence that it is the present-day successor to the historic sovereign entity which, under *Montoya* factor 3, exercised at least minimal government functions.

The court now examines in turn the foregoing factors which plaintiffs must prove in order to establish sovereign tribal status.

1. The Neets'aii Gwich'in are a Group of Indians.

The anthropological evidence at trial established that the Neets'aii Gwich'in [43] have been consistently identified as a separate and distinct group of American Indians.

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[41] *See supra* pp. 11-12.

[42] *See supra* pp. 11-12.

[43] The preferred modern spelling appears to be *Neets'aii Gwich'in*. Early works referring to the group use the spelling *Natsai Kutchin*. The name has been translated to mean "those who live off the Flats" (i.e., the Yukon River). Other variants of Neets'aii are *Natsit*, *Natche*, and *Natsik*.

The Neets'aii were identified as a separate group of Indians at the time of the first historical contact with Hudson Bay Traders. The earliest journalist to describe them was Alexander Hunter Murray, a Hudson Bay Company clerk. Murray refers to the inhabitants of the Chandalar River basin as the Nyetse-kutchin and also as the "Gens du large" [44] or northern Indians. Alexander Murray, *Journal of the Yukon 1847-1848* 10-11 (1910), cited in Exhibit 171 at 2.

Two professional anthropologists, Cornelius Osgood and Robert McKennan, separately visited the area in the early 1930s, each initially unaware of the other's work. Osgood published an ethnographic study on the Gwich'in in the late 1930s,[45] and Robert A. McKennan's work, *Anent the Kutchin Tribes*, was published in *American Anthropologist* in 1965 (Exhibit 176). The court finds the McKennan work to be the most authoritative source available on the Gwich'in people. Both Osgood and McKennan described the Neets'aii as one of eight or nine Gwich'in tribes. The Neets'aii inhabited a territory centered on the East Fork of the Chandalar River. Subsequent scholars have confirmed the continuing existence of the Neets'aii as a separate and distinct group of American Indians. 6 Richard Slobodin, *Kutchin, Handbook of North American Indians* 514-15 (Smithsonian 1981) (Exhibit 179—identified but not admitted); Dr. Joan Ryan, *Report on the Gwich'in* 3-5 (1990) (Exhibit 178).

One of the plaintiffs' experts, Dr. Jack Campisi, studied the family genealogies of the Venetie and Arctic

[44] The name *Gens du Large* was apparently created by Hudson's Bay Company voyagers, referring to the group's nomadic movements over great distances, and was eventually corrupted to Chandalar. This latter term "came to be applied to both the natives and the principal river that flows through their territory." Robert A. McKennan, *The Chandalar Kutchin* at 14 (1965) (Exhibit 176).

[45] Cornelius Osgood, *Kutchin Tribal Distribution and Synonymy*, American Anthropologist 36(2) (1934) (Exhibit 177—identified but not admitted).

Village residents and found that the ninety-nine households in the two villages were descended from thirteen families. He found that the villages are closely linked in ancestry, with several elders having descendants in both communities. Dr. Jack Campisi, *Final Report on the Neets'aii Gwich'in: Tribe of Indians of Alaska* (Exhibit 171 at 10-11). Of the roughly 200 people in Venetie, only about ten are non-native, all of whom are school teachers. Narrative testimony of Eddie Frank, ¶ 9, Clerk's Docket No. 96. Approximately the same proportion exists in Arctic Village.

On the basis of this evidence, the court finds that the people of Venetie, Arctic Village, and environs are a group of American Indians of the same or similar race.[46]

2. *The Group Inhabits a Particular Area*

The Gwich'in people have historically occupied a sizeable territory ranging from the upper reaches of the Koyukuk River in the west and to the MacKenzie River, Canada in the east, north to the crest of the Brooks range and south to roughly the 65th parallel. Dr. Joan Ryan, *Report on the Gwich'in* at 3 (Exhibit 178). The Gwich'in have been traditionally subdivided into eight or nine separate tribes, each occupying different territories.[47]

[46] The State approaches this issue from a different direction. It focuses on evidence that the residents of the two villages have intermarried over time with persons from other Gwich'in groups, and argues that this dilution negates any claim that they are of a different race from other natives in central Alaska.

The State's reasoning misses the point of the first prong of the *Montoya* test, which merely requires proof that the group consists of Indians that are of "a same or similar race." The *Montoya* test does not require such complete isolation from neighboring groups.

[47] Other Gwich'in groups include, from east to west, the Gwycha Gwich'in near the MacKenzie River, the Teetl'it Gwich'in in the drainage of the Peel River, the Takuth Gwich'in near the Upper Porcupine River, the Vanta Gwich'in who occupy the Porcupine River area, the Tranjik Gwich'in near the Black River, the Kutcha

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The Neets'aii Gwich'in primarily occupy an area consisting of the drainage of the East Fork of the Chandalar River and the headwaters of the Sheenjek River, east to the vicinity of the Porcupine River, and from the summit of the Brooks Range in the north to the Yukon River in the south. *Id.* at 4. This is the area in which they have traditionally hunted and fished.[48]

In the late 1930s and early 1940s, the residents of Venetie and Arctic Village petitioned the federal government to set aside a large reservation,[49] and on March 1, 1944, the reservation was established. The 1.8 million acre Venetie Reservation (sometimes referred to as the Chandalar Reservation) is in the heart of the land traditionally used by the Neets'aii. (Exhibit 206).

The State contends that many of the Neets'aii have dispersed to other Alaskan communities outside the area described above. The *Montoya* test requires a showing that the group inhabits a "particular though sometimes ill-defined territory". *Montoya v. United States*, 180 U.S. at 266. For purposes of establishing tribal status, specific boundaries need not be drawn. As with marriage into the group by those from other native groups, some out-migration of members is not proof that a purported tribe does not occupy a particular area. The State has not effectively rebutted the plaintiffs' evidence that the Neets'aii have historically occupied the Chandalar River basin apart from other Indian entities in north-central Alaska.

The court finds that the Neets'aii Gwich'in have, since before the appearance of non-natives, inhabited a reason-

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Gwich'in in the Yukon Flats area, the Te'uth Gwich'in near Birch Creek, and the Dahai Gwich'in who resided to the west of the Neets'aii. Dr. Joan Ryan, *Report on Gwich'in* at 4-5.

[48] Plaintiffs' Exhibit 206 is a topographic map of the area.

[49] The official survey of the reservation showed it to be 1,408,000 acres, which was amended in 1971 to 1,799,927.65 acres. The latter figure is roughly the size of the state of Delaware.

ably well-defined territory to the virtual exclusion of other people; and in modern times have occupied much of that same territory, in the form of the Venetie Reservation. They still occupy this same land.

3. *Community and Leadership*

The two preceding sections of this opinion have dealt with *Montoya* factors one and four, which have a relatively straightforward presentation. The terms employed are relatively easy to understand; and the evidence presented at trial bore directly upon those factors. The second and third *Montoya* factors, a cohesive community and leadership or government, present more difficult concepts which require considerable flexibility and understanding with respect to changes within native groups over time and differences between native groups in different parts of the country.[50] This court sees the community and leadership or government factors to be very much interrelated. Leadership or government without community (and vice-versa) has little meaning. *Montoya* holds that without leaders (some governance), there can be no tribe.[51] Similarly, leadership without a community to lead is meaningless and ignores the realities of man's

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[50] [I]t is appropriate that the definition of "tribe" remain broad enough and flexible enough to continue to reflect the inevitable changes in the meaning and importance of tribal relations for the tribal members and the wide variations among tribal groups living in different parts of the country under different conditions. That the Mashpees have lost this case represents not a failure of the law to protect Indians in changing times, but a failure of the evidence to show that this group was an object of the protective laws.

Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 588 (1st Cir. 1979). The First Circuit concludes this discussion with the observation that, "unlike, for instance, explanations of 'reasonable doubt', no one explanation of the *Montoya* definition can adequately serve in all cases at all times." *Id.*

[51] *Montoya v. United States*, 180 U.S. at 266.

political nature. Additionally, the amount of government which must be established is to be determined in relationship to the "situation" of the group in question. *Mashpee*, 592 F.2d at 584. Plainly, the "situation" referred to must be the perceived needs of the community.

The court will, in following paragraphs, discuss the evidence produced at trial in this case with a view toward determining whether the Neets'aii Gwich'in had acknowledged leaders and whether or not those leaders caused the Neets'aii Gwich'in to order their lives in some significant way. *Id.* at 584. In doing so, the court will evaluate the nature and extent of leadership or governance as it related to things of importance in the life of the Gwich'in. *Id.*

The court will also examine the evidence with respect to how leadership passed and how government evolved for the Neets'aii Gwich'in. In performing this function, the court is mindful of the admonition of the Ninth Circuit Court in *Native Village of Venetie*, that changes in government or governance flowing from adaptation to the ways of non-natives does not destroy tribal status unless the plaintiffs have become fully assimilated into a non-native culture. *Native Village of Venetie* 944 F.2d at 557, citing *United States* v. *State of Washington*, 641 F.2d 1368, 1373 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

The plaintiffs must also establish that the Gwich'in were united in a community. *Mashpee*, 592 F.2d at 585-86. In the process, the court will examine the evidence with respect to whether the villages are a community

> defined by characteristics which are identifiable as Indian, not necessarily aboriginal Indian.
> . . .
> [A] distinct community [does not exist if the group has] just blended in with everybody else, in all respects or in all significant respects.

Id. at 586 (quoting the jury charge of the trial court judge).

Montoya and the briefs of the parties offer the court no authoritative insight into the concept of community as a factor in tribal existence. One might think, and the court in *Mashpee* suggests, that contacts between a native group and government officials would be relevant in establishing the "government" component of this discussion.[82] The court finds the Ninth Circuit Court's discussion of this point in *Tyonek* to be more insightful. In *Tyonek*, the court suggested that dealings with government officials, "is evidence of the Village's political cohesiveness." *Native Village of Tyonek v. Puckett*, 957 F.2d at 635. Individuals (perhaps in great numbers) can severally approach the government for all manner of assistance. They may or may not be acting in concert with one another. Those who contact the federal government may have a following in the community; or they may be acting alone, with no community support. Conversely, however, such contacts, when explored fully, may prove to be backed by wide support in the group, i.e. cohesiveness in the group, a united community.

More generally, the community factor in tribal existence must necessarily have some meaning beyond race or ethnicity and place of residence. Otherwise, there would be no need of separate inclusion of this factor. The Venetie Council and Tribal Government must demonstrate that their people are joined together as a unit through beliefs, way of life, or the like which go beyond just ethnicity and place of residence.

The data regarding pre-contact tribal government practices among the Gwich'in are relatively sparse. McKennan found that the tribal affairs of the Neets'aii were governed by chiefs who exercised considerable power over

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[82] The court in *Mashpee* considered a series of petitions to the government as demonstrative of continuity of leadership. *Mashpee* at 585.

members of the group. Chiefs were usually either successful hunters and trappers or strong and aggressive war leaders. Robert A. McKennan, *Anent the Kutchin* at 65-67 (Exhibit 176). Evidence of pre-contact tribal organization was documented by the BIA in its *Report of Investigation for Sheenjek Caribou Fences*. (Exhibit 170). The fences were designed to entrap caribou during spring and fall. The cooperation and effort of the men, women and children from many families was required to construct, use and maintain the fences. *Id.* at 16-19.

McKennan found the Neets'aii living in three separate but inter-related bands that coordinated their hunting and fishing efforts.[53] Familial and social bonds between the groups were strong, with relatively little contact with members of more distant neighboring villages. Many witnesses at trial described the close bonds that continue to exist even today between the Neets'aii families of Arctic Village and Venetie. *See* Narrative testimony of Moses Sam, ¶¶ 5, 6; Jessie Williams, ¶ 6; Robert Frank, ¶ 8; Gideon James, ¶ 11; Sarah James, ¶ 8; Eddie Frank, ¶ 9; Ernest Erick, ¶ 4; and Maggie Roberts, ¶ 2; Clerk's Docket No. 96.

Sustained contact between the Neets'aii and non-Alaska white newcomers to the area did not occur until the early years of this century. Rapidly accelerating contact caused the Neets'aii form of governance to evolve from a traditional system, based on chiefs with authority over particular areas, into a tribal council system. As federal involvement in the area increased, the tribal organization became increasingly westernized. Campisi at 19-20, 46-47 (Exhibit 171). Under the leadership of John Fredson,

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[53] The third band, those not associated with the Venetie and Arctic Village areas, was a group that based its activities in the now deserted village of Christian. The population of Christian Village has dwindled in recent years with most of its inhabitants assimilating into Venetie and Arctic Village.

a native school teacher from Venetie, the Neets'aii contacted the Department of Interior in 1938 asking for a reservation encompassing Venetie, Arctic Village, Christian, and the fish camp at Ka-Chick.[54] (Exhibit 6). A map and a typed petition listing sixty names accompanied the correspondence. The Secretary responded by giving Fredson information about how to petition for a reservation, (Exhibit 9), as well as an IRA constitution for Venetie that had already been approved. (Exhibits 14 and 20). The voters in Venetie ratified the IRA constitution in January, 1940, and the reorganized government at Venetie was called the "Native Village of Venetie". (Exhibits 20-23). At the same time, a formal Reservation Application was transmitted to Washington, D.C. (Exhibit 17). The application was accompanied by three separate petitions (one each from Venetie and Ka-Chick and one from Arctic and Christian Villages) all requesting that the same tract of land be set aside for their benefit. Fredson and the Venetie Chief, John Frank, traveled by dog sled in the depths of winter to obtain signatures from all of the members of each village. (Exhibits 17, 18). The reservation was approved and established in 1944.

In the late 1950s, Arctic Village began to transform from a seasonal settlement into a permanent community when it acquired a store and a school. (Exhibit 10; Exhibit 175, identified but not admitted). In 1957, the Arctic Village residents unsuccessfully petitioned to expand the reservation to include lands to the north and west of their village. (Exhibit 51). In December, 1962, the first Venetie-Arctic Village Common Council meeting was held in Arctic Village. (Exhibit 55). Local concerns in the two villages continued to be handled by village

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[54] Currently rendered Kahtsik, also known as Robert's Fish Camp. Narrative testimony of Ernest Erick, ¶ 4, Clerk's Docket No. 96.

councils, but when regional matters arose, they were resolved by the Common Council.[55] *Id.*

In the late 1960s, the impending passage of the Alaska Native Claims Settlement Act ("ANCSA"), in which Congress intended to terminate reservations in Alaska, caused the Neets'aii to act to preserve their land. They requested Congress to enlarge their reservation to include the additional acreage requested by Arctic Village in 1957, and they asked that the title to the enlarged reservation be given to the natives of Venetie and Arctic Village. (Exhibit 70). They also sought to be included, along with Tyonek, in a proposed amendment to the then pending settlement legislation that would allow them to choose whether the reservation would be terminated. (Exhibit 68).

ANCSA revoked all reservations in Alaska but one, the Annette Island Reserve in southeast Alaska. 43 U.S.C. § 1618(a). However, Venetie and Arctic Village were given the option of jointly selecting the former reservation lands in lieu of sharing in the monetary and regional corporation benefits of the Act. 43 U.S.C. § 1618(b). The members of the villages voted overwhelmingly to take title to their reservation lands rather than become shareholders in the regional corporation and receive benefits from the Alaska Native Fund.[56] (Exhibit 77, 78). The United States deeded the former reservation lands in fee

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[55] It is reasonably clear from the record as a whole that the Tribal Government was called the "Common Council" in the early days of its existence. Trial testimony of Jessie Williams, Tr. at 2-163.

[56] Although ANCSA gave villages having lands reserved and set aside for their use and benefit the option of taking title to those lands in preference to other ANCSA benefits, 43 U.S.C. § 1618(b), nevertheless, provided that the election was to be made by a "Village Corporation or Corporations". ANCSA obligated the villages to form corporate entities and act through them for purposes of acquiring title to reservation lands.

simple to the Venetie and Arctic Village ANCSA corporations as tenants in common. (Exhibit 109).

In 1976, the village members held a meeting to formalize representation of the two villages in the Native Village of Venetie Tribal Government. They provided for equal representation from each village on the Tribal Council. A chief is selected alternately from Venetie and Arctic Village for a three year term. This action was taken without BIA involvement and has received no BIA approval or recognition. In 1979, the Village members, acting through their ANCSA village corporations, conveyed the title of their former reservation to the Native Village of Venetie Tribal Government. (Exhibit 106). The village corporations ceased to function and were dissolved. (Exhibit 117).

The court finds that the Neets'aii Gwich'in were, from first recorded history down to at least the time of ANCSA in the 1970s, a semi-nomadic hunter/gatherer society. The Neets'aii Gwich'in's needs for governance were limited largely to effecting their survival, the taking of caribou in the fall and winter, and fish and other game in the summer. In this, they recognized and were led by skilled hunters who outsiders, and later the Gwich'in themselves, came to call chiefs. It was the need to survive, sometimes referred to as a subsistence way of life,[57] that was the focus of organization within the Neets'aii Gwich'in. The chiefs provided the leadership and governance needed for the Neets'aii Gwich'in to sustain themselves. This governance, albeit limited and uncomplicated, was what their "situation required". *Mashpee*, 592 F.2d at 584.

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[57] Many—perhaps a majority—of the people living in rural or "bush" Alaska consider themselves to live a subsistence lifestyle. Evidence of the pursuit of a subsistence lifestyle—that is, living off the land—does not establish a community or political cohesiveness for purposes of proving tribal status. A subsistence way of life is, however, one attribute of what may be established to be a distinctively native community.

Although little evidence of any formal process for the selection of leaders or chiefs is before the court, the court infers from the evidence that has been produced that there was, in fact, a continuity of chiefs who were selected by consensus for their skill in assisting the Neets'aii Gwich'in in meeting their need for sustenance. These leaders were not selected only in times of incursion by others or natural disaster. The need for sustenance was an every day, ever present concern.

The court finds that, well into historic times, the Neets'aii Gwich'in were united in a community led by their chiefs. It is a fact that the Neets'aii Gwich'in lived in as many as four separate locations at various times during recorded history; but Venetie was, at all times pertinent hereto, the central community and the others, such as Arctic Village (until relatively recent times), Christian, and Kahtsik were temporary or seasonal hunting and/or fishing camps. Direct ties with Venetie always existed. The subcommunities were clearly connected by family relationships since first recorded history.

More recently, in the late 1930s, the Gwich'in came together as a single community to form an IRA and petition for a reservation. It is true that by the 1950s, Arctic Village had become a permanent community and, ultimately, there came to be a village council in both that community and Venetie. This was a natural evolution as these communities grew and developed. The evidence is that they were still closely connected by family ties. Most recently, beginning in the 1960s, the Neets'aii Gwich'in again came together as a single community to form their tribal government. The formation of the Native Village of Venetie Tribal Government was not at all evidence of division within the community. Significantly, the Neets'aii Gwich'in have chosen to dissolve their corporate entities which the Settlement Act imposed in favor of their communal government, which now holds title to the former

Venetie Reservation. The corporate dissolutions were a group or community decision.[58]

The State of Alaska argues that because the Neets'aii Gwich'in do not live in one place (and they have indeed moved from place to place within what came to be the Venetie Reservation over time) they are not united in a community. The State takes much too narrow a view of community. As the court has observed at the outset, *community* is not about *place*. It is about relationships—cohesiveness amongst residents. The Neets'aii Gwich'in have actively participated in their governance, choosing leaders and reforming their governing bodies as needs changed, from before recorded history down to the present; and as a group have a long history of dealings with the federal government.

The State of Alaska also contends that the Tribal Government is a legal non-entity. From a non-native point of view, the Tribal Government no doubt so appears. The Tribal Government has not been shown to have been sanctioned by either of the political branches of the federal government and is not sanctioned by the State of Alaska as a municipality or as a domestic corporation. The absence of any such status is, however, quite irrelevant. Tribal status does not depend on the establishment of some particular form of leadership or government. The requirement is that there be an Indian community and that it have some form of leadership or government over all relevant periods of time. The Neets'aii Gwich'in meet this requirement.

Similarly, the failure of Venetie to effect changes in its IRA constitution to fold in Arctic Village does not

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[58] There is no evidence that any of these actions were contrived to support a claim of tribal status in this case. The decision to convey the former Venetie Reservations lands to the Tribal Government plainly had its origins in the decision which the Neets'aii Gwich'in made over twetny years ago against joining in ANCSA other than to take title to their historic lands.

negate tribal status. As already noted, changes in tribal organization attributable to adaptation do not destroy tribal status. *United States v. State of Washington*, 641 F.2d 1368, 1373 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). Similarly, the failure to expand the IRA organization or, what is more accurate, a regression to a form of governance different from anglo-American forms (IRA organization or corporation) does not negate tribal status. Rather than suggesting assimilation or the lack of a distinctive community or governance, the evolution of group organizations for Venetie and Arctic Village between the 1930s and the 1960s as described above is strong evidence of the persistence of a uniquely Indian community. To the extent that the IRA Council did not meet the people's needs, they looked elsewhere and formed, and have for over 30 years maintained, a tribal government. To the extent that congressionally imposed corporate entities did not meet their needs, the Neets'aii Gwich'in have caused the dissolution of those village corporations and the former reservation lands have been transferred to the tribal government such that the Neets'aii Gwich'in have held their lands in a communal state since 1979. The Neets'aii Gwich'in still live what is essentially a subsistence lifestyle and do so on their own land with leaders chosen by them and governance in their chosen form, much as they did when they were first observed by Osgood and McKennan in the 1930s and previously. Just as they recognized chiefs in the earliest history and councils more recently, the Neets'aii Gwich'in as a comunity now recognize the Tribal Government as the vehicle to provide community governance. Tribes evolve as do other political institutions; and the law of tribal status makes allowance for such change. *Mashpee*, 592 F.2d at 588.

Plaintiffs have established by a preponderance of the evidence that from earliest recorded history down to the present, the Neets'aii Gwich'in have been unified as a community. They have always lived apart from other

groups of people. They have continuously submitted to some form of governance. Their earliest acknowledged leaders or chiefs directed and assisted the Neets'aii Gwich'in in meeting their needs. In modern times, the Neets'aii Gwich'in have come together to form a government sanctioned entity (the IRA council) in order to gain control over and protect their land upon which they depend for subsistence. As reflected by the evolution from the IRA, through ANCSA corporations and on to the Tribal Council, the Neets'aii Gwich'in have, over time and on their own terms, repeatedly come together as a community to organize themselves and provide for the governance which suits their lifestyle. The court finds that the Neets'aii Gwich'in have requisite political cohesiveness.

The court finds that the Neets'aii Gwich'in are a distinctly native community. What distinguishes them from others is their combined attachment to the land, which they hold in communal fee, and the caribou, which they hunt upon that land. This affinity for the land and its product is not commercial or capitalistic in nature. The Neets'aii Gwich'in have not and do not appear about to blend in to or become assimilated by a non-native society, even though they enjoy some of the benefits of that larger society. The Neets'aii Gwich'in way of life is distinctly native.

4. Modern-day Relationship to Historical Entity

The final factor necessary to establish sovereign tribal status is that the native entity claiming tribal status must be the "modern-day successor to sovereign historical bands of natives". *Native Village of Venetie*, 944 F.2d at 559; *Tyonek*, 957 F.2d at 635. The "modern-day successor" concept discussed in the Adoption Case and *Tyonek* is an outgrowth of the Ninth Circuit Court's holdings in *United States v. State of Washington*, 641 F.2d 1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). In *State of*

Washington, the modern-day successor rule is that "the group must have maintained an organized tribal structure." *Id.* at 1372. Explaining the foregoing, the Ninth Circuit Court made the following further observations:

> [T]ribal status is preserved if some defining characteristic of the original tribe persists in an evolving tribal community.
>
> The tribe need not have acquired organizational characteristics it did not possess when the treaties were signed. . . .
>
> Furthermore, changes in tribal policy and organization attributable to adaptation do not destroy tribal status.

Id. at 1372-73.

Applying the foregoing in *State of Washington*, the Ninth Circuit Court made note of the fact that the tribes in question have constitutions and formal governments which control the lives of their members. Similarly, the appellants failed to establish "the continuous informal cultural influence they concede is required." *State of Washington*, 641 F.2d at 1373. The appellants in *State of Washington* were of mixed blood due to intermarriages between Indians and non-Indians. They did not live in "distinctly Indian residential areas". The court took this as further evidence of a lack of tribal status. *State of Washington*, 641 F.2d at 1373-74. Concluding its discussion of continuity, and after observing that assimilation of Indians may be the result of federal or state discrimination, the Ninth Circuit Court held that continuity:

> [I]s required by the communal nature of tribal rights. To warrant special treatment, tribes must survive as distinct communities.

State of Washington, 641 F.2d at 1373.

The court finds that the Neets'aii Gwich'in who appear before the court through the Venetie Council and the

Tribal Government are the modern-day, institutional successors to the hunting leader/chiefs of first recorded history. Tribal government, especially in the early days, was limited; but no more government was needed and, therefore, no more was legally necessary for tribal status. Tribal status and its continuity may not be rejected because a native group fails to organize in some particular way that is useless to it. As already discussed at greater length, the Neets'aii Gwich'in shifted to a council form of government when the need arose to do so in order to gain control of lands from which they had traditionally subsisted. The Neets'aii Gwich'in rejected ANCSA rights in favor of maintaining control of those lands and abandoned even the ANCSA corporations, conveying their lands to the communal, tribal government, which they formed. There was no break in this sequence. The court finds that the village councils and, in particular, the Tribal Government are the modern-day successors to the historical hunting leader governance which characterized the Gwich'in at the earliest historical times.

Governmental continuity, however, is not sufficient to establish the present day Neets'aii Gwich'in as the modern-day successors to a historic entity. There must also be a continuous linkage between the institutional tribe and the communal group. *State of Washington*, 641 F.2d at 1373. As discussed at length in the immediately preceding section of this opinion, it is the Neets'aii Gwich'in people who have repeatedly come together to protect the land which the community now owns and to form the political institutions which have provided governance for them. The institutions are linked to the people and vice-versa. The Neets'aii Gwich'in who control the Tribal Government of today are the direct lineal descendants of the prehistorical groups and are a politically cohesive group which is distinctly native. The institutions have not taken on a life of their own. The Tribal Government is not isolated from the people nor has its focus become commercial.

The foregoing finding is bolstered by the paucity of evidence of assimilation and the scant evidence of tribal dispersement. Additionally, the present day Neets'aii Gwich'in are, by and large, the lineal descendants of the first known members of this tribe. Intermarriage with non-natives has been minimal. Significantly, the modern-day tribal members live much as they did at earliest historical times despite the use of a great many modern conveniences. The Neets'aii Gwich'in occupy and dominate their historic lands which are now held in communal fee. There are no non-native communities. By and large, the Neets'aii Gwich'in have not be absorbed by a cash economy. Venetie and Arctic Village are distinctly native communities. Venetie, in particular, is not materially different today insofar as demographics from what it was when first observed in the early 1900s.

The Neets'aii Gwich'in are the modern-day successors to a historical sovereign entity.

Based upon its findings of fact, the court concludes that the Neets'aii Gwich'in are a sovereign tribe as a matter of law.

III. Adoptions

In their joint statement of issues, counsel for the parties agreed that the court should also try the issue of whether the Venetie Council and/or Tribal Government have exercised child custody authority over tribal members.

In *Native Village of Venetie*, 944 F.2d at 562, the Ninth Circuit Court concluded its decision reinstating the plaintiffs' complaint in the Adoption Case with the observation that:

> On remand, the district court must determine whether the native villages of Venetie and Fort Yukon are the modern-day successors to an historical sovereign band of native Americans. If the district court determines that either village is a successor to

> such a sovereign, it must provide the relief necessary to ensure that the state of Alaska affords full faith and credit to adoption decrees issued by the tribal courts of the native village.

Native Village of Venetie, 944 F.2d at 562.

As already noted, the parties submitted written briefs in lieu of oral argument after trial in this case. The briefs of the parties do not address the issue of whether the Venetie Council and Tribal Government have exercised child custody authority over tribal members. The court supposes that the parties may have concluded in the light of the ruling of the Ninth Circuit Court as quoted above, that a conclusion by this court that the Neets'aii Gwich'in are a sovereign tribe was dispositive of this final issue. Certainly the quoted words would appear to stand for the proposition that a sovereign tribe is entitled to exercise jurisdiction over child custody matters as between tribe members.

For sake of completeness, the court finds that the Venetie Council has established by a preponderance of the evidence that both the Council and the Tribal Government have exercised child custody (adoption) authority over tribal members. Narrative testimony of Maggie Roberts, ¶ 8, Trial testimony at 2-91; Narrative testimony of Moses Sam, ¶ 21; Narrative testimony of Ernest Erick, ¶ 11, Trial testimony at 4-44 to 4-50; Narrative testimony of Eddie Frank, ¶ 15. In his narrative testimony and at trial, Mr. Frank testified that both the Venetie Council and Tribal Government acted as courts in such matters. Narrative testimony of Eddie Frank, ¶ 17, Trial testimony at 4-97.

The trial testimony of Ernest Erick was particularly helpful in assisting the court in understanding the relationship between the Tribal Government and village councils with respect to adoption matters. The court had before it an order for adoption (voluntary) purportedly

entered in the Native Village of Venetie, Village Court in the matter of a child of Sherry Erick. Defendants' Exhibit DH. This order grants an adoption in favor of Adoption Case plaintiff, Nancy Joseph. Based upon Mr. Erick's testimony, the court finds that the Tribal Government has exercised authority over child custody matters such as adoptions of the children of tribe members. In some instances, however, as with voluntary adoptions, the Tribal Government delegates to the appropriate village council authority to grant adoptions on a case-by-case basis.

The court concludes that the State of Alaska must afford full faith and credit to adoption decrees issued by the tribal courts of the Neets'aii Gwich'in—that is, by the Native Village of Venetie Tribal Government sitting as a court or the Arctic Village or Native Village of Venetie councils sitting as a court.

Conclusion

The court concludes that neither the Arctic Village Council, the Native Village of Venetie I.R.A. Council, nor the Native Village of Venetie Tribal Government have been acknowledged as tribes by the United States Government. The court concludes that the Neets'aii Gwich'in are a sovereign tribe as a matter of common-law. The court concludes that the adoption decrees of the native courts of the Neets'aii Gwich'in tribe are entitled to full faith and credit from the State of Alaska.

DATED at Anchorage, Alaska, this 23rd day of December, 1994.

/s/ [Illegible]
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 87-4333

THE STATE OF ALASKA, ex rel.; YUKON FLATS SCHOOL DISTRICT; UNALAKLEET/NEESER CONSTRUCTION JV; UNALAKLEET NATIVE CORPORATION; NEESER CONSTRUCTION COMPANY; and GERALD NEESER,

Plaintiffs-Appellees,

v.

NATIVE VILLAGE OF VENETIE; VENETIE NATIVE COUNCIL; the VENETIE TAX COURT; the VENETIE TAX COMMISSION; GIDEON JAMES; LAWRENCE ROBERTS; LARRY WILLIAMS; ERNEST ERICK; LINCOLN TRITT; JOHN TITUS; and DAVID CASE,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Alaska

Argued and Submitted June 7, 1988.

Decided Sept. 9, 1988.

Before WRIGHT, FERGUSON and BRUNETTI, Circuit Judges.

BRUNETTI, Circuit Judge:

I

The Village of Venetie ("Venetie") and Arctic Village are communities located in north-central Alaska, primarily inhabited by Native Alaskans. In 1940, Venetie reorganized under the Indian Reorganization Act of 1934 ("IRA"), ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. § 461 et seq.), forming both a constitutional governing body and a corporate body. Arctic Village did not reorganize.

In 1943, the Secretary of the Interior created a reservation out of approximately 1.8 million acres of land surrounding these villages. Congress revoked the reservation in 1971 by enacting § 19(a) of the Alaska Native Claims Settlement Act ("ANCSA"), Pub.L. No. 92-203, 85 Stat. 688, 710 (1971) (codified at 43 U.S.C. § 1618(a)). However, pursuant to § 19(b) of ANCSA, 43 U.S.C. § 1618(b), each village incorporated and acquired fee simple title to a portion of the former reservation land. Then, in 1978, the villages transferred title to the land to a joint governing body known as the Native Village of Venetie Tribal Government ("Native Village").

In 1978, Native Village adopted a five percent gross receipts tax on businesses operating upon its land. Due to the lack of commercial activity in the area, there was no opportunity to enforce the ordinance. This changed in 1986 when the State of Alaska ("State"), through one of its regional school districts, decided to construct an addition to the public high school in Venetie. While the State was soliciting bids from contractors, Native Village announced that it would impose the gross receipts tax on the contractor ultimately selected for the construction project.

The contract was awarded in February 1986, and construction commenced that summer. During the same period, Native Village replaced its gross receipts tax ordinance with a business activity tax ordinance. The new tax was levied in December, at which time the contractor was notified that it had incurred a liability of approximately $160,000. Neither the contractor nor the State paid the tax.

After Native Village had unsuccessfully attempted to collect the tax, the State informed Native Village that, as the real party in interest, it would challenge the tax in federal court. Native Village then filed a complaint in the Venetie Tax Court ("Native Court") against the State, the school district and the contractor ("appellees"). Rather than answer the complaint, appellees brought an action in the District of Alaska for declaratory and injunctive relief against Native Village, Venetie, the Native Court, and others ("appellants"). Appellees claimed that neither Native Village nor Venetie is an Indian tribe empowered to exercise tribal sovereignty, that neither entity exists on an Indian reservation, and therefore, that neither entity has jurisdiction to impose a tax on nonmembers. Appellants responded with a motion to dismiss, arguing that they are immune from suit by virtue of their tribal status, and that appellees have failed to exhaust tribal remedies.

On October 30, 1987, the district court reserved decision on the motion to dismiss. It did, however, decide preliminarily to enjoin appellants from further enforcement proceedings. On appeal, appellants challenge the merits of the preliminary injunction ruling, and also renew the substance of their motion to dismiss (which is still pending before the district court).

A district court's decision to grant a preliminary injunction should be reversed "only when the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact."

Colorado River Indian Tribes v. Town of Parker, 776 F.2d 846, 849 (9th Cir.1985).

II

Appellants first argue that the status of either Native Village or Venetie as an Indian tribe provides them with sovereign immunity, thereby depriving the district court of jurisdiction to entertain this action, even to the extent of granting a preliminary injunction.

Appellants accurately recognize that sovereign immunity is an incident of sovereign power, and that the sovereign power of an Indian community depends on its tribal status, *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-59, 98 S. Ct. 1670, 1675-77, 56 L.Ed.2d 106 (1978); *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1062-63 (1st Cir.1979). Their argument in favor of sovereign immunity assumes that either Native Village or Venetie has attained tribal status. However, appellees vigorously contest that issue. Thus, before we can conclude as to appellants' immunity from this action, we must determine whether Native Village or Venetie is a tribe for legal purposes.

Contrary to appellants' contention, this court's decision in *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir.1985), *cert. denied*, 474 U.S. 1055, 106 S.Ct. 793, 88 L.Ed.2d 771 (1986), did not hold that organization under the IRA is conclusive evidence of tribal status. In *Price*, the court merely stated that tribal status would be arguable in the event of IRA organization. *Id.* at 626. Also, amici have noted that the language of the IRA's Alaska amendment, 25 U.S.C. § 473a, raises doubt as to whether IRA organization should be construed so conclusively in the case of Alaskan Natives. Furthermore, much uncertainty exists concerning the structure of Native Village, Venetie, and Arctic Village that may have an impact on the IRA analysis.

If the IRA does not settle the matter, the inquiry would shift to whether Native Village or Venetie has been otherwise recognized as a tribe by the federal government. *See, e.g., Price*, 764 F.2d at 626-28. Failing there, tribal status may still be based on conclusions drawn from careful scrutiny of various historical factors. *See, e.g., Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 582-88 (1st Cir.), *cert. denied*, 444 U.S. 866, 100 S.Ct. 138, 62 L.Ed.2d 90 (1979).

Once tribal status is determined, other considerations arise. The sovereign immunity that naturally flows from tribal sovereignty will not be effective if it has been divested by Congress or otherwise lost by implication. *See United States v. Wheeler*, 435 U.S. 313, 322-26, 98 S.Ct. 1079, 1085-87, 55 L.Ed.2d 303 (1978); *Bottomly*, 599 F.2d at 1066. Nor will it be effective if it was waived during incorporation under the IRA. *See* W. Canby, *American Indian Law* 74-75 (1981). And even if the tribe and its instrumentalities are immune, the individual officers of the tribe will not be immune unless they were "acting in their representative capacity and within the scope of their authority." *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir.1985).

The district court recognized the complexity of the sovereign immunity question, and accordingly withheld its ruling pending "more study and a more carefully drawn decision." We will not attempt to decide this issue in the first instance, especially given the incomplete record that now exists. Appellants maintain that it would be a tremendous waste of judicial resources if the panel defers to the district court and the district court incorrectly concludes that there is no sovereign immunity. This is because the district court's decision would not be an appealable interlocutory order. We disagree. Rather than a waste, we believe that in this case it would be a necessary investment of judicial resources to develop a record and allow the district court to reach a decision as to its own jurisdiction.

The pendency of appellants' claim of sovereign immunity does not itself represent a bar to the district court's ability to impose a preliminary injunction. The district court was intent upon preserving the status quo in the face of appellants' motion to dismiss and the difficult question raised by the merits of the action. The Supreme Court has stated, in *United States v. United Mine Workers of America*, 330 U.S. 258, 293, 67 S.Ct. 677, 695, 91 L.Ed. 884 (1947), that the district court "had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief." *See also* 13 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3537 at 334 (1975). The Fifth (and later the Eleventh) Circuit has consistently echoed *United Mine Workers*. *See Fernandez-Roque v. Smith*, 671 F.2d 426, 431 (11th Cir.1982); *Stewart v. Dunn*, 363 F.2d 591, 598 (5th Cir.1966). We now do so as well.

Amici contend that a federal court should be barred from enjoining a parallel tribal court action just as it is barred from enjoining parallel state court actions. Even assuming that the Anti-Injunction Act pertains to tribal courts, the analogy made by amici is imperfect. There can be no question but that the fifty states of the Union are sovereign powers within our federalist system. But Indian communities can make no such claim. As we have outlined, not all Indian communities are considered tribes and therefore sovereign powers. The community in this case may not be sovereign. Until that uncertainty is resolved, amici's contention is premature.

Consequently, the district court did not act beyond its authority when it enjoined appellants.

III

Appellants also argue that this action should be dismissed because appellees have failed to exhaust available remedies in the Native Court. They principally rely on *National Farmers Union Insurance Co. v. Crow Tribe of Indians*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d

818 (1985), and *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987).

In *National Farmers*, the court announced the doctrine that examination of a tribal court's civil subject-matter jurisdiction "should be conducted in the first instance in the Tribal Court itself." 471 U.S. at 856, 105 S.Ct. at 2454. The *LaPlante* Court reiterated this doctrine, explaining that "[e]xhaustion is required as a matter of comity. . . ." 107 S.Ct. at 976 n. 8. Even a cursory reading of these two opinions reveals that the comity arises out of the "attributes of sovereignty" possessed by Indian tribes, their "inherent powers" of self-government, and the "vital role" of tribal courts in that process. *See National Farmers*, 471 U.S. at 851, 856, 105 S.Ct. at 2451, 2454; *LaPlante*, 107 S.Ct. at 975-78. Thus, before the exhaustion question can be addressed, the sovereignty question first must be resolved.

In the present case, appellants' exhaustion argument similarly assumes that either Native Village or Venetie has attained tribal status, and therefore sovereignty. As we have previously discussed, there is a serious dispute in this action on the issue of tribal status, and the district court has reserved its judgment. Here, as above, we have neither the inclination nor the necessary record to decide this issue in the first instance.

We therefore hold that at this stage of the litigation, the district court was not bound to require appellees to exhaust remedies available in the Native Court.

IV

Finally, appellants argue that the district court abused its discretion in imposing a preliminary injunction upon their enforcement of the tax ordinance at issue.

Traditionally, there are four factors to be considered before a court decides to grant or deny preliminary injunctive relief:

1) The likelihood of the plaintiff's success on the merits;

2) the threat of irreparable harm to the plaintiff if the injunction is not imposed;

3) the relative balance of this harm to the plaintiff and the harm to the defendant if the injunction is imposed; and,

4) the public interest.

See Los Angeles Memorial Coliseum Commission v. National Football League, 634 F.2d 1197, 1200 (9th Cir. 1980); 11 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2948 at 430-31 (1973).

In *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 551 (9th Cir.1977), this court treated factors two and three above as a single factor (*citing Alpine Lakes Protection Society v. Schlapfer*, 518 F.2d 1089, 1090 (9th Cir.1975)), and further noted that factor four is but one more interest to be balanced along with the interests of the parties. *Id.* Thus, there essentially are only two factors to be considered: The likelihood of the plaintiff's success on the merits; and, the relative balance of potential hardships to the plaintiff, defendant, and public.

These two factors have been employed in a test framed in the alternative. Basically, plaintiffs are entitled to preliminary injunctive relief if:

1) They demonstrate
   - a probable success on the merits, and
   - a possibility of irreparable injury;

2) or if they demonstrate
   - a fair chance of success on the merits (*i.e.*, serious questions are raised, and
   - the balance of hardships tips sharply in their favor.

See Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983); *Miss Universe, Inc. v. Flesher*, 605 F.2d 1130, 1134 (9th Cir.1979); *William Inglis & Sons Baking Company v. ITT Continental Baking Company, Inc.*, 526 F.2d 86, 88 (9th Cir.1975).

It is settled that the alternatives in the above test are not to be treated as two separate tests, but rather, as "extremes of a single continuum." *Benda v. Grand Lodge of International Association of Machinists & Aerospace Workers*, 584 F.2d 308, 315 (9th Cir.1978), *cert. dismissed*, 441 U.S. 937, 99 S.Ct. 2065, 60 L.Ed.2d 667 (1979). The proper approach is best summarized as follows:

> The critical element in determining the test to be applied is the relative hardship to the parties. If the balance of harm tips decidedly toward the plaintiff, then the plaintiff need not show as robust a likelihood of success on the merits as when the balance tips less decidedly. *Aguirre v. Chula Vista Sanitary Service*, 542 F.2d 779 (9th Cir.1976).

Id.; see also Inglis, 526 F.2d at 88.

Focusing initially on the harm that appellees would suffer in the absence of injunctive relief, the district court was persuaded by two arguments. First, it was persuaded that the other 200 native villages in Alaska would be prompted to engage in similar taxation which would create tremendous uncertainty and difficulty for the State and other businesses providing services to those villages. Second, it was persuaded that if appellees paid the alleged tax liability and litigated in the Native Court, the amount paid would be unavailable for reimbursement if appellees ultimately prevailed.

The first argument is persuasive in light of the posture of this action and political realities in the State. We note, as did the parties and the district court, that this action presents a question of first impression. One amicus brief

informs us of at least one similar action pending in the District of Alaska. *See Alyeska Pipeline Service Co. v. Kluti Kaah Native Village of Copper Center*, No. A87-201 Civil (D.Alaska). The other amicus briefs informs us that it was filed on behalf of over 180 Native Alaskan Communities that "have a vital interest in the issues presented in this appeal." Thus, the district court was acknowledging obvious and substantial developments in the area of Native Alaskan taxation, and the high profile of this particular action. It is not unrealistic to conclude that a decision denying this preliminary injunction would add fuel to the engines of Native Alaskan taxation, have a chilling effect on potential contractors, and subject the State to a significant financial burden (as a result of either paying the future levies or litigating their validity).

The second argument is equally compelling. As a poor community, Native Village probably has many immediate uses for its first tax revenue. The non-existence of other taxable commercial ventures within the former Reservation indicates that expenditures from the tax fund will not be offset by future revenue. Thus, if it became necessary to reimburse appellees, it is highly unlikely that Native Village would be able to do so, even in the face of a federal court order. Alternatively, if appellees ignored the Native Court proceeding, their property would be exposed to attachment following the entry of a default judgment against them.

On the other hand, we agree with the district court that appellants will suffer no measurable hardship. This is a new tax ordinance that has never been a source of revenue. Appellees simply are not dependent on the ordinance or the particular levy in this case. At best they may have the $160,000 earmarked to alleviate existing hardships in their community. But these hardships are not the result of the district court's preliminary injunction.

As to the public interest, we believe it favors this preliminary injunction. Certainly, public policy encourages

tribal courts as part of the self-determination of Indian tribes. *See LaPlante*, 107 S.Ct. at 977. It also encourages exhaustion of tribal remedies. *Id.* However, these policies would not be furthered if an Indian community, which is not a sovereign tribe, exercises powers that it clearly does not possess. Therefore, until it is decided that either Native Village or Venetie is a sovereign tribe, proceedings in the Native Court could not be in the public interest.

Furthermore, judicial economy is always a policy consideration. If appellants ultimately prevail in federal court on the tribal-status question, the most they could lose by virtue of this injunction is time (assuming that exhaustion would then be required). On the other hand, if appellants do not prevail on that question, this injunction will have saved them an unnecessary drain on the tribal judicial system. The public interest seems best served by minimizing the potential loss and imposing the injunction.

Consequently, we see the balance of hardships and interests tipping decidedly in favor of appellees and the injunction. The next consideration is the likelihood of appellees success on the merits.

The merits of this action concern whether appellants have jurisdiction to tax appellees' business activities in Native Village. The power to tax "is an inherent and essential part of the authority of any government. The power is therefore an aspect of the retained sovereignty of Indian tribes except where it has been limited or withdrawn by federal authority." F. Cohen, *Handbook on Federal Indian Law* 431 (1982) (footnote omitted). A tribe exercises its sovereign governmental authority within its tribal territory. The governing legal term for tribal territory is "Indian country." *Id.* at 27. Thus, it follows that a tribal tax is only valid within the confines of Indian country.

Congress has defined Indian country as follows:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian *reservation* under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all *dependent Indian communities* within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian *allotments*, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (emphasis added). This definition applies to both criminal and civil jurisdiction. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 1087 n. 5, 94 L.Ed.2d 244 (1987). Appellants concede that their land is not a reservation, and they make no claim to an allotment. Rather, they argue that either Native Village or Venetie is a dependent Indian community.

The term "dependent Indian community" was included in § 1151 in response to the Supreme Court's opinions in *United States v. Sandoval*, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913), and *United States v. McGowan*, 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410 (1937). *See* Reviser's Note, 1948 Act, 18 U.S.C.A. § 1151 (1984). In those cases, the Court held that the non-reservation Indian communities in question were sufficiently similar to reservation Indian communities to be included within the meaning of Indian country. The decisions turned on the dependent nature of the communities and the federal government's role as regulator and protector of those communities. *See Sandoval*, 231 U.S. at 48, 34 S.Ct. at 6; *McGowan*, 302 U.S. at 537-39, 58 S.Ct. at 287-88. In one case, the community land was owned in fee simple by the Tribe, *see Sandoval*, 231 U.S. at 48, 34 S.Ct. at 6,

and in the other case, title was held by the federal government. *See McGowan*, 302 U.S. at 539, 58 S.Ct. at 288.

The Supreme Court has not returned to this question since the enactment of § 1151. However, three circuits have done so. *See United States v. Azure*, 801 F.2d 336, 339 (8th Cir.1986); *United States v. Levesque*, 681 F.2d 75, 77-79 (1st Cir.), *cert. denied*, 459 U.S. 1089, 103 S.Ct. 574, 74 L.Ed.2d 936 (1982); *United States v. South Dakota*, 665 F.2d 837, 839-43 (8th Cir.1981), *cert. denied*, 459 U.S. 823, 103 S.Ct. 52, 74 L.Ed.2d 58 (1982); *Weddel v. Meierhenry*, 636 F.2d 211, 212-13 (8th Cir. 1980), *cert. denied*, 451 U.S. 941, 101 S.Ct. 2024, 68 L.Ed.2d 329 (1981); *United States v. Martine*, 442 F.2d 1022, 1023-24 (10th Cir.1971). Two very similar analyses have emerged from these cases—the *Martine* approach and the *South Dakota* approach.

In *Martine*, the Tenth Circuit approved a three-pronged analysis, considering:

> 1) the nature of the area;
>
> 2) the relationship of the area inhabitants to Indian tribes and the federal government; and,
>
> 3) the established practice of government agencies toward that area.

442 F.2d at 1023. In *South Dakota*, the Eighth Circuit applied a more extensive analysis, including the *Martine* considerations as well as:

> 1) the degree of federal ownership of and control over the area;
>
> 2) the degree of cohesiveness of the area inhabitants; and,
>
> 3) the extent to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples.

665 F.2d at 839.

As these approaches illustrate, the ultimate conclusion as to whether an Indian community is Indian country is quite factually dependent. It is also dependent on whether the inhabitants constitute a tribe for legal purposes, which, as we discussed earlier, is another complex factual question. Because the record in the present case is so undeveloped, we cannot form an opinion on the merits, and like the district court, we cannot determine which party will probably succeed on the merits. However, in light of the large number of similar Native Alaskan communities in Alaska, this is a very important case raising far-reaching issues.

Because the balance of hardships tips decidedly in appellees' favor, and because serious questions are raised on the merits, the district court did not abuse its discretion in granting appellees preliminary injunctive relief. Accordingly, we affirm the district court's decision.

AFFIRMED.

APPENDIX E

MINUTES OF THE UNITED STATES DISTRICT COURT DISTRICT OF ALASKA

Case No. F87-51 Civil
THE HONORABLE ANDREW J. KLEINFELD

THE STATE OF ALASKA, EX REL, *et al.*

vs.

NATIVE VILLAGE OF VENETIE, *et al.*

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* * * *

PROCEEDINGS: ORAL ARGUMENT ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND DEFENDANTS' MOTION TO DISMISS:

Court convened at 2:30 p.m.

Statements of Court and counsel heard.

MOTION to dismiss RESERVED by the Court pending further study.

MOTION for preliminary injunction GRANTED except for taxes imposed on members living in the territorial limits and for airport landing fees.

Court heard arguments on case A85-503 Civil.

Mr. Mertz counsel agreed to delay action on A85-503 Civil to give Mr. Aschenbrenner time to file appeal.

Court recessed at 4:15 p.m.

Date: October 30, 1987 Deputy Clerk's initials: RJW

APPENDIX F

[Filed Jan. 23, 1997]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-35042
DC No. CV-87-00051-HRH

STATE OF ALASKA *ex rel.* YUKON FLATS SCHOOL DISTRICT, UNALAKLEET/NEESER CONSTRUCTION JV, UNALAKLEET NATIVE CORPORATION, NEESER CONSTRUCTION COMPANY, and GERALD NEESER,
Plaintiffs-Appellees,

-v.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, a/k/a THE NATIVE VILLAGE OF VENETIE, THE VENETIE TAX COURT, THE VENETIE TAX COMMISSION, GIDEON JAMES, LAWRENCE ROBERTS, LARRY WILLIAMS, ERNEST ERICK, LINCOLN TRITT, JOHN TITUS, and DAVID CASE,
Defendants-Appellants.

ORDER

Before: BROWNING, D.W. NELSON and FERNANDEZ, Circuit Judges.

The State of Alaska's Unopposed Motion to Stay Issuance of the Mandate until final disposition by the United States Supreme Court is hereby GRANTED.

APPENDIX G

[Filed Jan. 6, 1997]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-35042
DC No. CV-87-00051-HRH

STATE OF ALASKA *ex rel.* YUKON FLATS SCHOOL DISTRICT, UNALAKLEET/NEESER CONSTRUCTION JV, UNALAKLEET NATIVE CORPORATION, NEESER CONSTRUCTION COMPANY, and GERALD NEESER,
Plaintiffs-Appellees,

v.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, a/k/a THE NATIVE VILLAGE OF VENETIE, THE VENETIE TAX COURT, THE VENETIE TAX COMMISSION, GIDEON JAMES, LAWRENCE ROBERTS, LARRY WILLIAMS, ERNEST ERICK, LINCOLN TRITT, JOHN TITUS, and DAVID CASE,
Defendants-Appellants.

ORDER

Before: BROWNING, D.W. NELSON and FERNANDEZ, Circuit Judges.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judges Browning and Fernandez voted to reject the suggestion for rehearing en banc, and Judge D.W. Nelson so recommended.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX H

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1151 provides:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

43 U.S.C. § 1601 provides:

Congress finds and declares that—

(a) there is an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims;

(b) the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska;

(c) no provision of this chapter shall replace or diminish any right, privilege or obligation of Natives as citizens

of the United States or of Alaska, or relieve, replace, or diminish any obligation of the United States or of the State or Alaska to protect and promote the rights or welfare of Natives as citizens of the United States or of Alaska; the Secretary is authorized and directed, together with other appropriate agencies of the United States Government, to make a study of all Federal programs primarily designed to benefit Native people and to report back to the Congress with his recommendations for the future management and operation of these programs within three years of December 18, 1971;

(d) no provision of this chapter shall constitute a precedent for reopening, renegotiating, or legislating upon any past settlement involving land claims or other matters with any Native organizations, or any tribe, band, or identifiable group of American Indians;

(e) no provision of this chapter shall effect a change or changes in the petroleum reserve policy reflected in sections 7421 through 7438 of title 10 except as specifically provided in this chapter;

(f) no provision of this chapter shall be construed to constitute a jurisdictional act, to confer jurisdiction to sue, nor to grant implied consent to Natives to sue the United States or any of its officers with respect to the claims extinguished by the operation of this chapter; and

(g) no provision of this chapter shall be construed to terminate or otherwise curtail the activities of the Economic Development Administration or other Federal agencies conducting loan or loan and grant programs in Alaska. For this purpose only, the terms "Indian reservation" and "trust or restricted Indian-owned land areas" in Public Law 89-136, the Public Works and Economic Development Act of 1965, as amended [42 U.S.C. 3121 et seq.], shall be interpreted to include lands granted to Natives under this chapter as long as such lands remain in the ownership of the Native Villages or the Regional Corporations.

43 U.S.C. § 1603 provides:

(a) Aboriginal title extinguishment through prior land and water area conveyances

All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.

(b) Aboriginal title and claim extinguishment where based on use and occupancy; submerged lands underneath inland and offshore water areas and hunting or fishing rights included

All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

(c) Aboriginal claim extinguishment where based on right, title, use, or occupancy of land or water areas; domestic statute or treaty relating to use and occupancy; or foreign laws; pending claims

All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

43 U.S.C. § 1606 provides:

(a) Division of Alaska into twelve geographic regions; common heritage and common interest of region; area of region commensurate with operations of Native association; boundary disputes, arbitration

For purposes of this chapter, the State of Alaska shall be divided by the Secretary within one year after December 18, 1971, into twelve geographic regions, with each region composed as far as practicable of Natives having a common heritage and sharing common interests. In the absence of good cause shown to the contrary, such regions shall approximate the areas covered by the operations of the following existing Native associations:

(1) Arctic Slope Native Association (Barrow, Point Hope);

(2) Bering Straits Association (Seward Peninsula, Unalakleet, Saint Lawrence Island);

(3) Northwest Alaska Native Association (Kotzebue);

(4) Association of Village Council Presidents (southwest coast, all villages in the Bethel area, including all villages on the Lower Yukon River and the Lower Kuskokwim River);

(5) Tanana Chiefs' Conference (Koyukuk, Middle and Upper Yukon Rivers, Upper Kuskokwim, Tanana River);

(6) Cook Inlet Association (Kenai, Tyonek, Eklutna, Iliamna);

(7) Bristol Bay Native Association (Dillingham, Upper Alaska Peninsula);

(8) Aleut League (Aleutian Islands, Pribilof Islands and that part of the Alaska Peninsula which is in the Aleut League);

(9) Chugach Native Association (Cordova, Tatitlek, Port Graham, English Bay, Valdez, and Seward);

(10) Tlingit-Haida Central Council (southeastern Alaska, including Metlakatla);

(11) Kodiak Area Native Association (all villages on and around Kodiak Island); and

(12) Copper River Native Association (Copper Center, Glennallen, Chitina, Mentasta).

Any dispute over the boundaries of a region or regions shall be resolved by a board of arbitrators consisting of one person selected by each of the Native associations involved, and an additional one or two persons, whichever is needed to make an odd number of arbitrators, such additional person or persons to be selected by the arbitrators selected by the Native associations involved.

(b) Region mergers; limitation

The Secretary may, on request made within one year of December 18, 1971, by representative and responsible leaders of the Native associations listed in subsection (a) of this section, merge two or more of the twelve regions: *Provided*, That the twelve regions may not be reduced to less than seven, and there may be no fewer than seven Regional Corporations.

(c) Establishment of thirteenth region for nonresident Natives; majority vote; Regional Corporation for thirteenth region

If a majority of all eligible Natives eighteen years of age or older who are not permanent residents of Alaska elect, pursuant to section 1604(c) of this title, to be enrolled in a thirteenth region for Natives who are nonresidents of Alaska, the Secretary shall establish such a region for the benefit of the Natives who elected to be enrolled therein, and they may establish a Regional Corporation pursuant to this chapter.

(d) Incorporation; business for profit; eligibility for benefits; provisions in articles for carrying out chapter

Five incorporators within each region, named by the Native association in the region, shall incorporate under the laws of Alaska a Regional Corporation to conduct business for profit, which shall be eligible for the benefits of this chapter so long as it is organized and functions in accordance with this chapter. The articles of incorporation shall include provisions necessary to carry out the terms of this chapter.

(e) Original articles and bylaws: approval by Secretary prior to filing, submission for approval; amendments to articles: approval by Secretary; withholding approval in event of creation of inequities among Native individuals or groups

The original articles of incorporation and bylaws shall be approved by the Secretary before they are filed, and they shall be submitted for approval within eighteen months after December 18, 1971. The articles of incorporation may not be amended during the Regional Corporation's first five years without the approval of the Secretary. The Secretary may withhold approval under this section if in his judgment inequities among Native individuals or groups of Native individuals would be created.

(f) Board of directors; management; stockholders; provisions in articles or bylaws for number, term, and method of election

The management of the Regional Corporation shall be vested in a board of directors, all of whom, with the exception of the initial board, shall be stockholders over the age of eighteen. The number, terms, and method of election of members of the board of directors shall be fixed in the articles of incorporation or bylaws of the Regional Corporation.

(g) Issuance of stock

(1) Settlement Common Stock

(A) The Regional Corporation shall be authorized to issue such number of shares of Settlement Common Stock (divided into such classes as may be specified in the articles of incorporation to reflect the provisions of this chapter) as may be needed to issue one hundred shares of stock to each Native enrolled in the region pursuant to section 1604 of this title.

(B)(i) A Regional Corporation may amend its articles of incorporation to authorize the issuance of additional shares of Settlement Common Stock to—

(I) Natives born after December 18, 1971, and, at the further option of the Corporation, descendants of Natives born after December 18, 1971,

(II) Natives who were eligible for enrollment pursuant to section 1604 of this title but were not so enrolled, or

(III) Natives who have attained the age of 65,

for no consideration or for such consideration and upon such terms and conditions as may be specified in such amendment or in a resolution approved by the board of directors pursuant to authority expressly vested in the board by the amendment. The amendment to the articles of incorporation may specify which class of Settlement Common Stock shall be issued to the various groups of Natives.

(ii) Not more than one hundred shares of Settlement Common Stock shall be issued to any one individual pursuant to clause (i).

(iii) The amendment authorized by clause (i) may provide that Settlement Common Stock issued to a Native pursuant to such amendment (or stock issued in exchange for such Settlement Common Stock pursuant to subsection (h)(3) of this section or section 1629c(d) of this title) shall be deemed canceled upon the death of such Native. No compensation for this cancellation shall be paid to the estate of the deceased Native or to any person holding the stock.

(iv) Settlement Common Stock issued pursuant to clause (i) shall not carry rights to share in distributions made to shareholders pursuant to subsections (j) and (m) of this section unless, prior to the issuance of such stock, a majority of the class of existing holders of Settlement Common Stock carrying such rights separately approve the granting of such rights. The articles of incorporation of the Regional Corporation shall be deemed to be amended to authorize such class vote.

(C)(i) A Regional Corporation may amend its articles of incorporation to authorize the issuance of additional shares of Settlement Common Stock as a dividend or other distribution (without regard to surplus of the corporation under the laws of the State) upon each outstanding share of Settlement Common Stock issued pursuant to subparagraphs (A) and (B).

(ii) The amendment authorized by clause (i) may provide that shares of Settlement Common Stock issued as a dividend or other distribution shall constitute a separate class of stock with greater per share voting power than Settlement Common Stock issued pursuant to subparagraphs (A) and (B).

(2) Other forms of stock

(A) A Regional Corporation may amend its articles of incorporation to authorize the issuance of

shares of stock other than Settlement Common Stock in accordance with the provisions of this paragraph. Such amendment may provide that—

(i) preemptive rights of shareholders under the laws of the State shall not apply to the issuance of such shares, or

(ii) issuance of such shares shall permanently preclude the corporation from—

(I) conveying assets to a Settlement Trust, or

(II) issuing shares of stock without adequate consideration as required under the laws of the State.

(B) The amendment authorized by subparagraph (A) may provide that the stock to be issued shall be one or more of the following—

(i) divided into classes and series within classes, with preferences, limitations, and relative rights, including, without limitation—

(I) dividend rights,

(II) voting rights, and

(III) liquidation preferences;

(ii) made subject to one or more of—

(I) the restrictions on alienation described in clauses (i), (ii), and (iv) of subsection (h)(1)(B) of this section, and

(II) the restriction described in paragraph (1)(B)(iii); and

(iii) restricted in issuance to—

(I) Natives who have attained the age of sixty-five;

(II) other identifiable groups of Natives or identifiable groups of descendants of Natives defined in terms of general applicability and not in any way by reference to place of residence or family;

(III) Settlement Trusts; or

(IV) entities established for the sole benefit of Natives or descendants of Natives, in which the classes of beneficiaries are defined in terms of general applicability and not in any way by reference to place of residence, family, or position as an officer, director, or employee of a Native Corporation.

(C) The amendment authorized by subparagraph (A) shall provide that the additional shares of stock shall be issued—

(i) as a dividend or other distribution (without regard to surplus of the corporation under the laws of the State) upon all outstanding shares of stock of any class or series, or

(ii) for such consideration as may be permitted by law (except that this requirement may be waived with respect to issuance of stock to the individuals or entities described in subparagraph (B)(iii)).

(D) During any period in which alienability restrictions are in effect, no stock whose issuance is authorized by subparagraph (A) shall be—

(i) issued to, or for the benefit of, a group of individuals composed only or principally of employees, officers, and directors of the corporation; or

(ii) issued more than thirteen months after the date on which the vote of the shareholders

on the amendment authorizing the issuance of such stock occurred if, as a result of the issuance, the outstanding shares of Settlement Common Stock will represent less than a majority of the total voting power of the corporation for the purpose of electing directors.

(3) Disclosure requirements

(A) An amendment to the articles of incorporation of a Regional Corporation authorized by paragraph (2) shall specify—

(i) the maximum number of shares of any class or series of stock that may be issued, and

(ii) the maximum number of votes that may be held by such shares.

(B)(i) If the board of directors of a Regional Corporation intends to propose an amendment pursuant to paragraph (2) which would authorize the issuance of classes or series of stock that, singly or in combination, could cause the outstanding shares of Settlement Common Stock to represent less than a majority of the total voting power of the corporation for the purposes of electing directors, the shareholders of such corporation shall be expressly so informed.

(ii) Such information shall be transmitted to the shareholders in a separate disclosure statement or in another informational document in writing or in recorded sound form both in English and any Native language used by a shareholder of such corporation. Such statement or informational document shall be transmitted to the shareholders at least sixty days prior to the date on which such proposal is to be submitted for a vote.

(iii) If not later than thirty days after issuance of such disclosure statement or informational docu-

ment the board of directors receives a prepared concise statement setting forth arguments in opposition to the proposed amendment together with a request for distribution thereof signed by the holders of at least 10 per centum of the outstanding shares of Settlement Common Stock, the board shall either distribute such statement to the shareholders or provide to the requesting shareholders a list of all shareholder's names and addresses so that the requesting shareholders may distribute such statement.

(4) Savings

(A)(i) No shares of stock issued pursuant to paragraphs (1)(C) and (2) shall carry rights to share in distributions made to shareholders pursuant to subsections (j) and (m) of this section. No shares of stock issued pursuant to paragraph (1)(B) shall carry such rights unless authorized pursuant to paragraph (1)(B)(iv).

(ii) Notwithstanding the issuance of additional shares of stock pursuant to paragraphs (1)(B), (1)(C), or (2), a Regional Corporation shall apply the ratio last computed pursuant to subsection (m) of this section prior to February 3, 1988, for purposes of distributing funds pursuant to subsections (j) and (m) of this section.

(B) The issuance of additional shares of stock pursuant to paragraphss (1)(B), (1)(C), or (2) shall not affect the division and distribution of revenues pursuant to subsection (i) of this section.

(C) No provision of this chapter shall limit the right of a Regional Corporation to take an action authorized by the laws of the State unless such action is inconsistent with the provisions of this chapter.

(h) Settlement Common Stock

(1) Rights and restrictions

(A) Except as otherwise expressly provided in this chapter, Settlement Common Stock of a Regional Corporation shall—

(i) carry a right to vote in elections for the board of directors and on such other questions as properly may be presented to shareholders;

(ii) permit the holder to receive dividends or other distributions from the corporation; and

(iii) vest in the holder all rights of a shareholder in a business corporation organized under the laws of the State.

(B) Except as otherwise provided in this subsection, Settlement Common Stock, inchoate rights thereto, and rights to dividends or distributions declared with respect thereto shall not be—

(i) sold;

(ii) pledged;

(iii) subjected to a lien or judgment execution;

(iv) assigned in present or future;

(v) treated as an asset under—

(I) title 11 or any successor statute,

(II) any other insolvency or moratorium law, or

(III) other laws generally affecting creditors' rights; or

(vi) otherwise alienated.

(C) Notwithstanding the restrictions set forth in subparagraph (B), Settlement Common Stock may be transferred to a Native or a descendant of a Native—

(i) pursuant to a court decree of separation, divorce, or child support;

(ii) by a holder who is a member of a professional organization, association, or board that limits his or her ability to practice his or her profession because he or she holds Settlement Common Stock; or

(iii) as an inter vivos gift from a holder to his or her child, grandchild, great-grandchild, niece, nephew, or (if the holder has reached the age of majority as defined by the laws of the State of Alaska) brother or sister.

(2) Inheritance of Settlement Common Stock

(A) Upon the death of a holder of Settlement Common Stock, ownership of such stock (unless canceled in accordance with subsection (g)(1)(B)(iii) of this section) shall be transferred in accordance with the lawful will of such holder or pursuant to applicable laws of intestate succession. If the holder fails to dispose of his or her stock by will and has no heirs under applicable laws of intestate succession, the stock shall escheat to the issuing Regional Corporation and be canceled.

(B) The issuing Regional Corporation shall have the right to purchase at fair value Settlement Common Stock transferred pursuant to applicable laws of intestate succession to a person not a Native or a descendant of a Native after February 3, 1988, if—

(i) the corporation—

(I) amends its articles of incorporation to authorize such purchases, and

(II) gives the person receiving such stock written notice of its intent to purchase within ninety days after the date that

the corporation either determines the decedent's heirs in accordance with the laws of the State or receives notice that such heirs have been determined, whichever later occurs; and

(ii) the person receiving such stock fails to transfer the stock pursuant to paragraph (1)(C)(iii) within sixty days after receiving such written notice.

(C) Settlement Common Stock of a Regional Corporation—

(i) transferred by will or pursuant to applicable laws of intestate succession after February 3, 1988, or

(ii) transferred by any means prior to February 3, 1988,

to a person not a Native or a descendant of a Native shall not carry voting rights. If at a later date such stock is lawfully transferred to a Native or a descendant of a Native, voting rights shall be automatically restored.

(3) Replacement Common Stock

(A) On the date on which alienability restrictions terminate in accordance with the provisions of section 1629c of this title, all Settlement Common Stock previously issued by a Regional Corporation shall be deemed canceled, and shares of Replacement Common Stock of the appropriate class shall be issued to each shareholder, share for share, subject only to subparagraph (B) and to such restrictions consistent with this chapter as may be provided by the articles of incorporation of the corporation or in agreements between the corporation and individual shareholders.

(B)(i) Replacement Common Stock issued in exchange for Settlement Common Stock issued subject

to the restriction authorized by subsection (g)(1)(B)(iii) of this section shall bear a legend indicating that the stock will eventually be canceled in accordance with the requirements of that subsection.

(ii) Prior to the termination of alienability restrictions, the board of directors of the corporation shall approve a resolution to provide that each share of Settlement Common Stock carrying the right to share in distributions made to shareholders pursuant to subsections (j) and (m) of this section shall be exchanged either for—

(I) a share of Replacement Common Stock that carries such right, or

(II) a share of Replacement Common Stock that does not carry such right together with a separate, non-voting security that represents only such right.

(iii) Replacement Common Stock issued in exchange for a class of Settlement Common Stock carrying greater per share voting power than Settlement Common Stock issued pursuant to subsections (g)(1)(A) and (g)(1)(B) of this section shall carry such voting power and be subject to such other terms as may be provided in the amendment to the articles of incorporation authorizing the issuance of such class of Settlement Common Stock.

(C) The articles of incorporation of the Regional Corporation shall be deemed amended to authorize the issuance of Replacement Common Stock and the security described in subparagraph (B)(ii)(II).

(D) Prior to the date on which alienability restrictions terminate, a Regional Corporation may amend its articles of incorporation to impose upon Replacement Common Stock one or more of the following—

(i) a restriction denying voting rights to any holder of Replacement Common Stock who is not a Native or a descendant of a Native;

(ii) a restriction granting the Regional Corporation, or the Regional Corporation and members of the shareholder's immediate family who are Natives or descendants of Natives, the first right to purchase, on reasonable terms, the Replacement Common Stock of the shareholder prior to the sale or transfer of such stock (other than a transfer by will or intestate succession) to any other party, including a transfer in satisfaction of a lien, writ of attachment, judgment execution, pledge, or other encumbrance; and

(iii) any other term, restriction, limitation, or provision authorized by the laws of the State.

(E) Replacement Common Stock shall not be subjected to a lien or judgment execution based upon any asserted or unasserted legal obligation of the original recipient arising prior to the issuance of such stock.

(i) Certain natural resource revenues; distribution among twelve Regional Corporations; computation of amount; subsection inapplicable to thirteenth Regional Corporation

Seventy per centum of all revenues received by each Regional Corporation from the timber resources and subsurface estate patented to it pursuant to this chapter shall be divided annually by the Regional Corporation among all twelve Regional Corporations organized pursuant to this section according to the number of Natives enrolled in each region pursuant to section 1604 of this title. The provisions of this subsection shall not apply to the thirteenth Regional Corporation if organized pursuant to subsection (c) hereof.

(j) Corporate funds and other net income, distribution among: stockholders of Regional Corporations; Village Corporations and nonresident stockholders; and stockholders of thirteenth Regional Corporation

During the five years following December 18, 1971, not less than 10% of all corporate funds received by each of the twelve Regional Corporations under section 1605 of this title (Alaska Native Fund), and under subsection (i) of this section (revenues from the timber resources and subsurface estate patented to it pursuant to this chapter), and all other net income, shall be distributed among the stockholders of the twelve Regional Corporations. Not less than 45% of funds from such sources during the first five-year period, and 50% thereafter, shall be distributed among the Village Corporations in the region and the class of stockholders who are not residents of those villages, as provided in subsections to it. In the case of the thirteenth Regional Corporation, if organized, not less than 50% of all corporate funds received under section 1605 of this title shall be distributed to the stockholders.

(k) Distributions among Village Corporations; computation of amount

Funds distributed among the Village Corporations shall be divided among them according to the ratio that the number of shares of stock registered on the books of the Regional Corporation in the names of residents of each village bears to the number of shares of stock registered in the names of residents in all villages.

(*l*) Distributions to Village Corporations; village plan: withholding funds until submission of plan for use of money; joint ventures and joint financing of projects; disagreements, arbitration of issues as provided in articles of Regional Corporation

Funds distributed to a Village Corporation may be withheld until the village has submitted a plan for the use of the money that is satisfactory to the Regional Corporation. The Regional Corporation may require a village

plan to provide for joint ventures with other villages, and for joint financing of projects undertaken by the Regional Corporation that will benefit the region generally. In the event of disagreement over the provisions of the plan, the issues in disagreement shall be submitted to arbitration, as shall be provided for in the articles of incorporation of the Regional Corporation.

(m) Distributions among Village Corporations in a region; computation of dividends for nonresidents of village; financing regional projects with equitably withheld dividends and Village Corporation funds

When funds are distributed among Village Corporations in a region, an amount computed as follows shall be distributed as dividends to the class of stockholders who are not residents of those villages: The amount distributed as dividends shall bear the same ratio to the amount distributed among the Village Corporations that the number of shares of stock registered on the books of the Regional Corporation in the names of nonresidents of villages bears to the number of shares of stock registered in the names of village residents: *Provided*, That an equitable portion of the amount distributed as dividends may be withheld and combined with Village Corporation funds to finance projects that will benefit the region generally.

(n) Projects for Village Corporations

The Regional Corporation may undertake on behalf of one or more of the Village Corporations in the region any project authorized and financed by them.

(*o*) Annual audit; place; availability of papers, things, or property to auditors to facilitate audits; verification of transactions; report to stockholders

The accounts of the Regional Corporation shall be audited annually in accordance with generally accepted auditing standards by independent certified public accountants or independent licensed public accountants,

certified or licensed by a regulatory authority of the State or the United States. The audits shall be conducted at the place or places where the accounts of the Regional Corporation are normally kept. All books, accounts, financial records, reports, files, and other papers, things, or property belonging to or in use by the Regional Corporation and necessary to facilitate the audits shall be available to the person or persons conducting the audits; and full facilities for verifying transactions with the balances or securities held by depositories, fiscal agent, and custodians shall be afforded to such person or persons. Each audit report or a fair and reasonably detailed summary thereof shall be transmitted to each stockholder.

(p) Federal-State conflict of laws

In the event of any conflict between the provisions of this section and the laws of the State of Alaska, the provisions of this section shall prevail.

(q) Business management group; investment services contracts

Two or more Regional Corporations may contract with the same business management group for investment services and advice regarding the investment of corporate funds.

43 U.S.C. § 1607 provides:

(a) Organization of Corporation prerequisite to receipt of patent to lands or benefits under chapter

The Native residents of each Native village entitled to receive lands and benefits under this chapter shall organize as a business for profit or nonprofit corporation under the laws of the State before the Native village may receive patent to lands or benefits under this chapter, except as otherwise provided.

(b) Regional Corporation: approval of initial articles; review and approval of amendments to articles and annual budgets; assistance in preparation of articles and other documents

The initial articles of incorporation for each Village Corporation shall be subject to the approval of the Regional Corporation for the region in which the village is located. Amendments to the articles of incorporation and the annual budgets of the Village Corporations shall, for a period of five years, be subject to review and approval by the Regional Corporation. The Regional Corporation shall assist and advise Native villages in the preparation of articles of incorporation and other documents necessary to meet the requirements of this subsection.

(c) Applicability of section 1606

The provisions of subsections (g), (h), and (*o*) of section 1606 of this title shall apply in all respects to Village Corporations, Urban Corporations, and Group Corporations.

43 U.S.C. § 1611 provides:

(a) Acreage limitation; proximity of selections and size of sections and units; waiver

(1) During a period of three years from December 18, 1971, the Village Corporation for each Native village identified pursuant to section 1610 of this title shall select, in accordance with rules established by the Secretary, all of the township or townships in which any part of the village is located, plus an area that will make the total selection equal to the acreage to which the village is entitled under section 1613 of this title. The selection shall be made from lands withdrawn by section 1610(a) of this title: *Provided*, That no Village Corporation may select more than 69,120 acres from lands withdrawn by section 1610(a)(2) of this title, and not more than

69,120 acres from the National Wildlife Refuge System, and not more than 69,120 acres in a National Forest: *Provided further*, That when a Village Corporation selects the surface estate to lands within the National Wildlife Refuge System or Naval Petroleum Reserve Numbered 4, the Regional Corporation, for that region may select the subsurface estate in an equal acreage from other lands withdrawn in section 1610(a) of this title within the region, if possible.

(2) Selections made under this subsection (a) of this section shall be contiguous and in reasonably compact tracts, except as separated by bodies of water or by lands which are unavailable for selection, and shall be in whole sections and, wherever feasible, in units of not less than 1,280 acres: *Provided*, That the Secretary in his discretion and upon the request of the concerned Village Corporation, may waive the whole section requirement where—

(A)(i) a portion of available public lands of a section is separated from other available public lands in the same section by lands unavailable for selection or by a meanderable body of water;

(ii) such waiver will not result in small isolated parcels of available public land remaining after conveyance of selected lands to Native Corporations; and

(iii) such waiver would result in a better land ownership pattern or improved land or resource management opportunity; or

(B) the remaining available public lands in the section have been selected and will be conveyed to another Native Corporation under this chapter.

(b) Allocation; reallocation considerations

The difference between twenty-two million acres and the total acreage selected by Village Corporations pursuant to subsection (a) of this section shall be allocated by the Secretary among the eleven Regional Corporations (which excludes the Regional Corporation for southeastern Alaska) on the basis of the number of Natives enrolled in each region. Each Regional Corporation shall reallocate such acreage among the Native villages within the region on an equitable basis after considering historic use, subsistence needs, and population. The action of the Secretary or the Corporation shall not be subject to judicial review. Each Village Corporation shall select the acreage allocated to it from the lands withdrawn by section 1610(a) of this title.

(c) Computation

The difference between thirty-eight million acres and the 22 million acres selected by Village Corporations pursuant to subsections (a) and (b) of this section shall be allocated among the eleven Regional Corporations (which excludes the Regional Corporation for southeastern Alaska) as follows:

(1) The number of acres each Regional Corporation is entitled to receive shall be computed (A) by determining on the basis of available data the percentages of all lands in Alaska (excluding the southeastern region) that is within each of the eleven regions, (B) by applying that percentage to thirty-eight million acres reduced by the acreage in the southeastern region that is to be selected pursuant to section 1615 of this title, and (C) by deducting from the figure so computed the number of acres within that region selected pursuant to subsections (a) and (b) of this section.

(2) In the event that the total number of acres selected within a region pursuant to subsecitons (a) and (b) of the section exceeds the percentage of the reduced thirty-eight million acres allotted to that region pursuant to subsection (c)(1)(B) of this section, that region shall not be entitled to receive any lands under this subsection (c). For each region so affected the difference between

the acreage calculated pursuant to subsection (c)(1)(B) of this section and the acreage selected pursuant to subsections (a) and (b) of this section shall be deducted from the acreage calculated under subsection (c)(1)(C) of this section for the remaining regions which will select lands under this subsection (c). The reductions shall be apportioned among the remaining regions so that each region's share of the total reduction bears the same proportion to the total reduction as the total land area in that region (as calculated pursuant to subsection (c)(1)(A) of this section bears to the total land area in all of the regions whose allotments are to be reduced pursuant to this paragraph.

(3) Before the end of the fourth year after December 18, 1971, each Regional Corporation shall select the acreage allocated to it from the lands within the region withdrawn pursuant to section 1610(a)(1) of this title, and from the lands within the region withdrawn pursuant to section 1610(a)(3) of this title to the extent lands withdrawn pursuant to section 1610(a)(1) of this title are not sufficient to satisfy its allocation: *Provided*, That within the lands withdrawn by section 1610(a)(1) of this title the Regional Corporation may select only even numbered townships in even numbered ranges, and only odd numbered townships in odd numbered ranges.

(4) Where the public lands consist only of the mineral estate, or portion thereof, which is reserved by the United States upon patent of the balance of the estate under one of the public land laws, other than this chapter, the Regional Corporations may select as follows:

(A) Where such public lands were not withdrawn pursuant to section 1610(a)(3) of this title, but are surrounded by or contiguous to lands withdrawn pursuant to section 1610(a)(3) of this title, and filed upon for selection by a Regional Corporation, the Corporation may, upon request, have such public

land included in its selection and considered by the Secretary to be withdrawn and properly selected.

(B) Where such public lands were withdrawn pursuant to section 1610(a)(1) of this title and are required to be selected by paragraph (3) of this subsection, the Regional Corporation may, at its option, exclude such public lands from its selection.

(C) Where the Regional Corporation elects to obtain such public lands under subparagraph (A) or (B) of this paragraph, it may select, within ninety days of receipt of notice from the Secretary, the surface estate in an equal acreage from other public lands withdrawn by the Secretary for that purpose. Such selections shall be in units no smaller than a whole section, except where the remaining entitlement is less than six hundred and forty acres, or where an entire section is not available. Where possible, selections shall be of lands from which the subsurface estate was selected by that Regional Corporation pursuant to subsection (a)(1) of this section or section 1613(h)(9) of this title, and, where possible, all selections made under this section shall be contiguous to lands already selected by the Regional Corporation or a Village Corporation. The Secretary is authorized, as necessary, to withdraw up to two times the acreage entitlement of the in lieu surface estate from vacant, unappropriated, and unreserved public lands from which the Regional Corporation may select such in lieu surface estate except that the Secretary may withdraw public lands which had been previously withdrawn pursuant to subsection 1616(d)(1) of this title.

(D) No mineral estate or in lieu surface estate shall be available for selection within the National Petroleum Reserve—Alaska or within Wildlife Refuges as the boundaries of those refuges exist on December 18, 1971.

(d) Village Corporation for Native village at Dutch Harbor; lands and improvements and patent for Village Corporation

To insure that the Village Corporation for the Native village at Dutch Harbor, if found eligible for land grants under this chapter, has a full opportunity to select lands within and near the village, no federally owned lands, whether improved or not, shall be disposed of pursuant to the Federal surplus property disposal laws for a period of two years from December 18, 1971. The Village Corporation may select such lands and improvements and receive patent to them pursuant to section 1613(a) of this title.

(e) Disputes over land selection rights and boundaries; arbitration

Any dispute over the land selection rights and the boundaries of Village Corporations shall be resolved by a board of arbitrators consisting of one person selected by each of the Village Corporations involved, and an additional one or two persons, whichever is needed to make an odd number of arbitrators, such additional person or persons to be selected by the arbitrators selected by the Village Corporations.

43 U.S.C. § 1618 provides:

(a) Notwithstanding any other provision of law, and except where inconsistent with the provisions of this chapter, the various reserves set aside by legislation or by Executive or Secretarial Order for Native use or for administration of Native affairs, including those created under section 497 of title 25, are hereby revoked subject to any valid existing rights of non-Natives. This section shall not apply to the Annette Island Reserve established by section 495 of title 25 and no person enrolled in the Metlakatla Indian community of the Annette Island Reserve shall be eligible for benefits under this chapter.

(b) Notwithstanding any other provision of law or of this chapter, any Village Corporation or Corporations may elect within two years to acquire title to the surface and subsurface estates in any reserve set aside for the use or benefit of its stockholders or members prior to December 18, 1971. If two or more villages are located on such reserve, the election must be made by all of the members or stockholders of the Village Corporations concerned. In such event, the Secretary shall convey the land to the Village Corporation or Corporations, subject to valid existing rights as provided in section 1613(g) of this title, and the Village Corporation shall not be eligible for any other land selections under this chapter or to any distribution of Regional Corporations funds pursuant to section 1606 of this title, and the enrolled residents of the Village Corporation shall not be eligible to receive Regional Corporation stock.

43 U.S.C. § 1620(d) provides:

(d) Real property interests; exemption period for conveyance of interests not developed or leased or interests used solely for exploration, interests taxable; derivative revenues taxable; exchanges; simultaneous exchanges

(1) Real property interests conveyed, pursuant to this chapter, to a Native individual, Native Group, Village or Regional Corporation or corporation established pursuant to section 1613(h)(3) of this title which are not developed or leased to third parties or which are used solely for the purposes of exploration shall be exempt from State and local real property taxes for a period of twenty years from the vesting of title pursuant to the Alaska National Interest Lands Conservation Act or the date of issuance of an interim conveyance or patent, whichever is earlier, for those interests to such individual, group, or corporation: *Provided*, That municipal taxes, local real property taxes, or local assessments may be imposed upon any portion of such interest within the jurisdiction of any

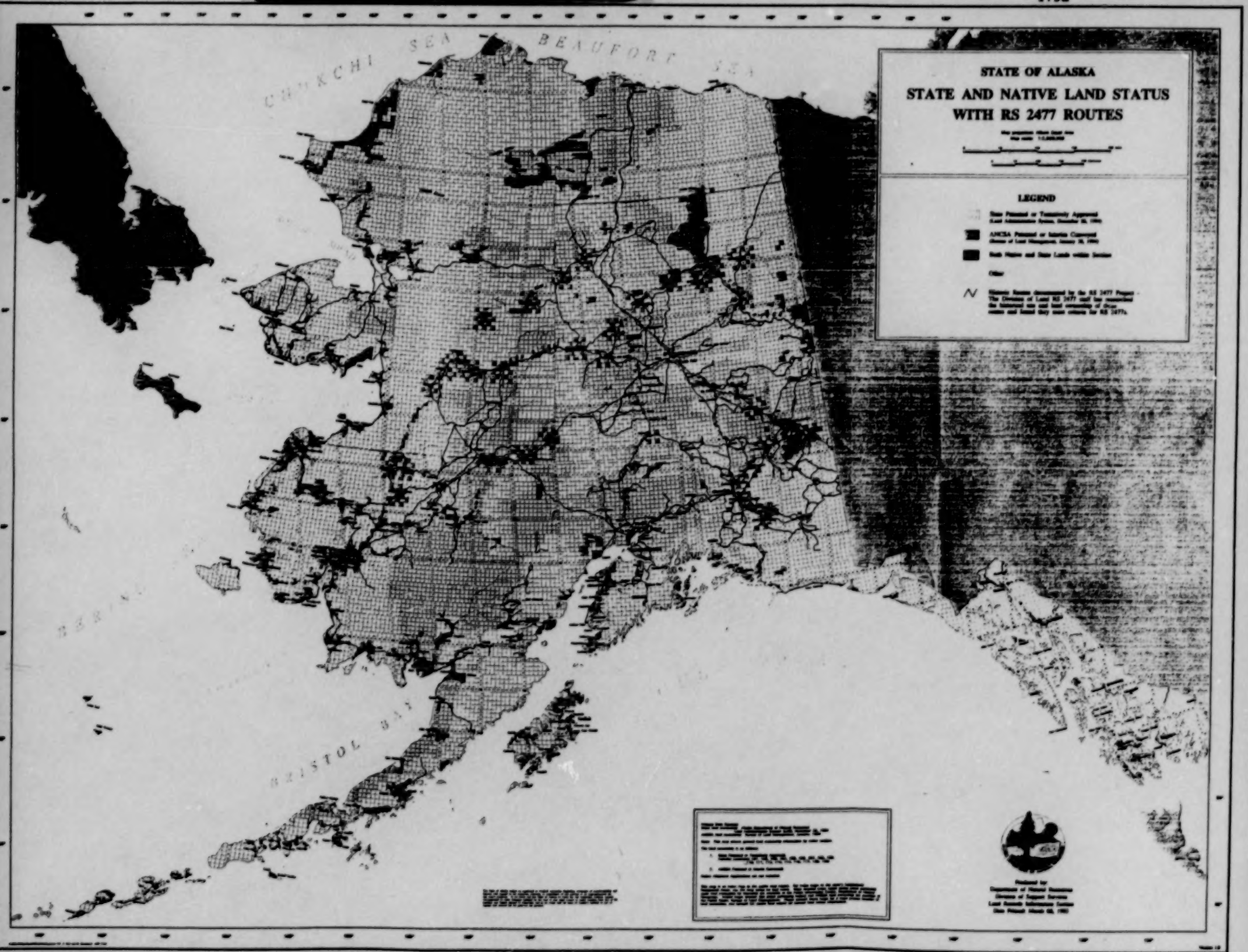
governmental unit under the laws of the State which is leased or developed for purposes other than exploration for so long as such portion is leased or being developed: *Provided further*, That easements, rights-of-way, leaseholds, and similar interests in such real property may be taxed in accordance with State or local law. All rents, royalties, profits, and other revenues or proceeds derived from such property interests shall be taxable to the same extent as such revenues or proceeds are taxable when received by a non-Native individual or corporation.

(2) Any real property interest, not developed or leased to third parties, acquired by a Native individual, Native Group, Village or Regional Corporation, or corporation established pursuant to section 1613(h)(3) of this title in exchange for real property interests which are exempt from taxation pursuant to paragraph (1) of this subsection shall be deemed to be a property interest conveyed pursuant to this chapter and shall be exempt from taxation as if conveyed pursuant to this chapter, when such an exchange is made with the Federal Government, the State government, a municipal government, or another Native Corporation, or, if neither party to the exchange receives a cash value greater than 25 per centum of the value of the land exchanged, a private party. In the event that a Native Corporation simultaneously exchanges two or more tracts of land having different periods of tax exemption pursuant to this subsection, the periods of tax exemption for the exchanged lands received by such Native Corporation shall be determined (A) by calculating the percentage that the acreage of each tract given up bears to the total acreage given up, and (B) by applying such percentages and the related periods of tax exemption to the acreage received in exchange.

43 U.S.C. § 1624 provides:

The Secretary is authorized to issue and publish in the Federal Register, pursuant to subchapter II of chapter 5 of title 5, such regulations as may be necessary to carry out the purposes of this chapter.

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Supreme Court, U.S.
FILED
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CLERK

No. 96-1577

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF ALASKA

Petitioner,

v.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *et al.*,

Respondents.

On Petition For Writ of Certiorari To the United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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May 20, 1997

QUESTION PRESENTED

In 1943, the Secretary of the Interior set aside a 1.8 million acre reservation in Alaska (less than one-half of one percent of the State's land area) to protect the hunting grounds of the Natives of Venetie and Arctic Villages ("Venetie Reservation"). Unlike almost all other Native villages in Alaska, the Natives of Venetie and Arctic Villages elected under section 19(b) of the 1971 Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601, 1618(b) ("ANCSA"), to acquire title to their existing reservation and thereby to forego any other land or economic benefits under the Act. The question presented is:

Whether the Ninth Circuit correctly held, based on the complete absence of language in ANCSA extinguishing Indian country in Alaska, that the Native Village of Venetie Tribal Government (which represents both Venetie and Arctic Villages) occupies Indian country and retains its inherent authority to tax business activities occurring within its territory in order to provide essential governmental services in an area not served by any other local government.

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Liquor Ordinance, Village of Allakaket,
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OTHER AUTHORITIES:

Dave Case, *Alaska Natives and American Laws*
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Felix S. Cohen, *Handbook on Federal*
Indian Law 766 (1982) 18, 20, 25
Don Hunter, *State to Seek Quick Appeal*
of Sovereignty Ruling, ANCHORAGE
DAILY NEWS, November 22, 1996 at 1 12
Robert L. Stern, *et al, Supreme Court Practice,*
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INTRODUCTION

In this case the State of Alaska challenges the Indian country status of the Venetie Tribal Government's lands in remote north central Alaska, questioning the Tribe's authority to regulate the same lands it has continuously governed and occupied since before recorded history. In rejecting the State's challenge, the Court of Appeals applied two statutes: the "dependent Indian community" provision of the Indian country statute, 18 U.S.C. § 1151(b), and the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq.* ("ANCSA"). With respect to the former, the court applied the "virtually identical" standard developed by the First, Eighth and Tenth Circuits to conclude that the isolated Venetie Tribe occupies a "dependent Indian community" subject to tribal jurisdiction. With respect to the latter, a statute plainly unique to Alaska, the Court of Appeals concluded that Congress' absolute silence on the issue of Indian country left intact Venetie's Indian country status and the Tribe's resulting authority to regulate its own affairs. Neither conclusion merits further review in this Court.

First, the decision below is specific to Venetie's unique treatment under ANCSA, since Venetie elected to opt out of ANCSA's benefits in order to retain title to its 1943 Reservation. The limited scope of the Circuit's judgment thus does not carry with it the misleading, erroneous and exaggerated implications suggested by the State. Second, the judgment is entirely interlocutory, since the District Court has yet to address the battery of arguments advanced by the State against the particular tax challenged here, any one of which may moot the ruling below.

Third, there is no conflict between the Court of Appeals and the decisions of this Court or any other court. The Ninth Circuit's "dependent Indian community" ruling mirrors the standard developed by every other circuit to have considered 18 U.S.C. § 1151(b), and is in conformity with this Court's case law upon which § 1151(b) was based, *United States v. Sandoval*, 231 U.S. 28 (1913). Moreover, the precise situation here does not arise in other circuits. Further, the decision below is not in conflict with the rulings of the Alaska Supreme Court, which has never been called upon to rule on the Indian country status of any Alaska Native village, nor even considered questions of tribal sovereignty since the recent congressional and Executive reaffirmation of Venetie's (and other Native villages') federally-recognized tribal status.

Finally, the Court of Appeal's reading of ANCSA comports fully with this Court's admonition against implying a divestiture of Indian country status in a statute that is absolutely silent on the matter and whose legislative history does not even once mention Indian country or tribal jurisdiction. *Mattz v. Arnett*, 412 U.S. 481 (1973); *United States ex rel. Hualapai Indians v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339 (1941). This is particularly compelling given Congress' continuous revisiting of ANCSA since 1971, as well as its treatment of Alaska tribes as inhabiting Indian country in scores of other congressional enactments.

COUNTER STATEMENT

1a. Respondent Native Village of Venetie Tribal Government, organized pursuant to § 16 of the Indian Reorganization Act of 1934, as amended, 25 U.S.C. § 476, ("IRA") is the federally-recognized governing body of the Neets'aii Gwich'in, an Athabascan Indian tribe of some 350

enrolled members who reside in the "distinctly native villages" of Venetie and Arctic Village. Pet. App. 124a. The Venetie territory, set aside as a reservation in 1943 and later transferred to these villages in fee under ANCSA, is situated at the southern edge of the Brooks Range in north central Alaska and consists of some 1.8 million acres. *Id.*[1] All but a few residents of the area are Neets'aii tribal members. *Id.* 63a. There are no non-Native communities within the Venetie territory, and the "Venetie [Reservation area], in particular, is not materially different today . . . from what it was when first observed [by non-Indians] in the early 1900s." *Id.* 124a.

The entire 1943 reservation area is now owned by the Neets'aii Gwich'in ("Neets'aii") in communal fee and is governed by the Venetie Tribal Government. *Id.* There is no state-chartered government or any other form of local government. *Id.* 63a.[2] No road or railroad serves the area. The two villages are accessible only by air on a year-round basis, by boat in the summer and by dog team or snowmobile in the winter. *Id.* 61a. "With the exception of modest houses and a very few public buildings which serve the Neets'aii Gwich'in almost exclusively, the area is totally undeveloped." *Id.* While benefitting in recent years from various federal and state health, education and social welfare

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[1] Alaska comprises some 371,000,000 acres, more than twice the size of the State of Texas. This case involves only a small fraction of that enormous expanse.

[2] Unlike other states, not all areas of Alaska are within an organized "borough" (Alaska's version of a county). Instead, most of Alaska is within the "unorganized boroughs", *see* Alaska Const. art. X, § 6. Alaska's other form of state-chartered local government is a municipality. The Venetie territory is not within any "organized borough" nor does it encompass any state municipality.

programs, the Neets'aii continue to follow a traditional "subsistence" way of life based on hunting, fishing and gathering. *Id.* 62a. The lands owned and controlled by Respondent Venetie Tribal Government are used for this purpose. *Id.*

b. In 1938, the Neets'aii petitioned the Secretary of the Interior to set aside a portion of their aboriginal lands as a reservation to protect their exclusive use and occupancy. *Id.* 115a. Pursuant to a Secretarial election, the Neets'aii ratified an IRA constitution on January 25, 1940, and in 1943 the Secretary, under Congressional authority, withdrew the requested 1.8 million acre Reservation. *Id.* 2a. The Venetie Tribal Government governs this land and the Neets'aii Gwich'in Tribe, while the two local councils perform daily law and order functions in the villages in coordination with the central Tribal Government. Together, the Tribal and Village Councils maintain the peace, provide for the general welfare of all inhabitants, and enforce local law. *Id.* 125a.

c. In the late 1960s the Neets'aii land base was threatened by the impending congressional land claims legislation which proposed replacing all reservations and aboriginal land holdings in Alaska with a population-based Native land selection regime. *Id.* 116a. In response, the Neets'aii sought to be included in a proposed amendment that would allow them to opt out of the legislation and retain title to their 1943 Reservation lands. *Id.* This effort succeeded.

While § 1618(a) of ANCSA revoked "the various reserves set aside" for Alaska Natives by prior legislation or executive action, § 1618(b) allowed Tribes such as Venetie and Arctic Village to secure fee title to their former reservation lands in lieu of sharing in the monetary, land, regional corporation and other land settlement provisions of

the Act. On November 10, 1973, the Neets'aii of the Venetie Reservation voted to opt out of ANCSA, and to instead take title to their 1943 Reservation lands. Pet. App. 116a. The United States then conveyed the Reservation lands in a unitary conveyance to the two ANCSA village corporations in fee simple as tenants in common.[3] *Id.* 117a. In 1979, the tribal membership, acting through the two village corporations, reconveyed their 1943 Reservation lands to the Venetie Tribal Government. *Id.* The two village corporations then ceased to function and were dissolved. *Id.*

2a. In 1978, acting pursuant to its authority as a federally recognized Indian Tribe "to control economic activity within its jurisdiction, and to defray the cost of providing governmental services," *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 137 (1982), the Venetie Tribal Government (hereinafter "Venetie") adopted a five percent gross receipts tax, later to be replaced with a five percent business activities tax,[4] on businesses operating on the

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[3] Although ANCSA gave Tribes like Venetie and Arctic Village the choice of opting out, the Act nonetheless required that the opt out election be made by a "Village Corporation or Corporations." 43 U.S.C. § 1618(b). As a consequence, the Act compelled Venetie and Arctic Village to form new corporate entities. Only six of the over 200 tribes affected by ANCSA pursued this opt out election, including Elim, the Gambell and Savoonga communities on St. Lawrence Island, and the Northway Indians of the Tetlin Reserve. *See also Doyon Ltd. v. Bristol Bay Native Corp.*, 569 F.2d 491 (9th Cir. 1978) (Venetie and Arctic Village Natives not considered ANCSA shareholders for purposes of regional corporation land selection entitlements measured by shareholder counts). Having opted out, the Villages were not required to reconvey any lands to the State or other municipalities under § 1613(c) of ANCSA.

[4] The amended tax was modeled after the tribal tax approved by this Court in *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985).

Tribe's lands within its territorial jurisdiction. Pet. App. 87a. In 1986, the Tribe attempted to enforce this tax against Neeser Construction Company in connection with a state-funded school construction project. After payment was refused, the Tribe filed suit against the construction company in the Venetie Tax Court. *Id.* 129a. Although the State by contract had agreed to reimburse Neeser for any Tribal tax ultimately found to be due,[5] the State refused to defend in tribal court and instead brought a federal action in 1987 in the District of Alaska for declaratory and injunctive relief. *Id.* Venetie moved to dismiss, based on its sovereign immunity from suit and the State's failure to exhaust tribal court remedies. *Id.* The District Court issued a preliminary injunction enjoining the Tribe from further enforcement of the tax in Tribal Court pending the outcome of the federal action. *Id.*

b. On appeal, the Ninth Circuit upheld the injunction, holding that the validity of Venetie's tax turned on whether Venetie is a federally recognized tribe occupying a "dependent Indian community" under 18 U.S.C. § 1151(b). Pet. App. 137a-138a. The Ninth Circuit adopted the Eighth and Tenth Circuits' approaches for determining the existence of a "dependent Indian community," and remanded the case to the District Court. *Id.* 139a-140a.

c. On remand after trial, the District Court affirmed Venetie's tribal status, but held that it does not occupy Indian

[5] *See* Pet. at ii ("Under the contract the State assumed liability for [Venetie's] taxes").

country.[6] *Id.* 27a, n.6. The District Court conceded in a separate opinion that up "[u]ntil 1971 ... the Neets'aii Gwich'in were treated by Congress and the Executive agencies as being subject to active superintendence to such a degree as to amount to a dependent Indian community for purposes of 18 U.S.C. § 1151(b)," *id.* 67a. Nonetheless, the District Court found that ANCSA had implicitly extinguished Venetie's dependent Indian community status. *Id.* 71a.

d. On appeal, a unanimous panel reversed. On the ANCSA issue, the Court held that "ANCSA does not contain a definitive statement expressing its effect upon Indian country in Alaska ... . Accordingly ... ANCSA did not extinguish Indian country in Alaska, and ...Venetie, having demonstrated that it qualifies as a dependent Indian community, occupies its territory as Indian country." *Id.* 32a. Judge Fernandez wrote separately, concurring in the result that "ANCSA did not eliminate Indian country in Alaska ... . I agree that Venetie's territory is Indian country, if any still exists in Alaska." *Id.* 36a.

On the Indian country issue, the court below applied this Court's decisions in *United States v. John*, 437 U.S. 634 (1978), and *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991), and held that a federal set aside of land and federal superintendence over a community are necessary elements of a dependent Indian community under 18 U.S.C. § 1151(b). Pet. App. 11a. The court found that Venetie's land met the "set aside" requirement, notwithstanding Congress' use of Native village

[6] The State did not appeal from that judgment. The State's recognition that Venetie is a sovereign tribe but its refusal to recognize Venetie's jurisdiction over its land, would create the anomaly of Venetie being a Tribal government with no territory to govern.

business corporations to initially receive the land, because (among other things) under ANCSA Natives "own and manage the corporations," *id.* 15a; membership in the corporations is restricted to Natives, *id.*; the village corporations enjoy immunities from various tax and securities laws, *id.* 16a, 17a, n. 3; village corporate stock is inalienable, *id.* 17a; and voting rights in village corporations are restricted to Native shareholders notwithstanding inheritance later by non-Native persons. The court added that tribal ownership in fee does not automatically foreclose the land's Indian country status, *id.* 18a (*citing United States v. Sandoval,* 231 U.S. 28, 48 (1913)).

The Ninth Circuit's analysis then focused specifically on Venetie:

> Venetie presents an especially compelling illustration of this conclusion. Section 1618(b) of ANCSA permits a village corporation to acquire title to 'any reserve set aside for the use or benefit of its stockholders or members prior to December 18, 1971.' In exchange, the village corporation forfeits any claim to land or funds distributed by the regional corporation under ANCSA. When the members of the Venetie and Arctic Village corporations voted to exercise their rights under § 1618(b), they received a parcel of land that mapped the former reservation of their common Tribe -- the Neets'aii Gwich'in. Title to this former reserve was subsequently transferred to Venetie, effecting the result made possible by § 1618(b): reunification of the Tribe and its reserve land.

Pet. App. 30a-31a.

The court below also found that Venetie satisfied the federal superintendence requirement, noting that the special federal-tribal trust relationship survived ANCSA, *id.* 19a; that federal superintendence over a community need not be "dominant" or "pervasive" over state activity (as the district court ruled) nor exclusive of state participation for Indian country status to continue, *id.* 20a (*citing Bryan v. Itasca County*, 426 U.S. 373, 388-89 (1976));[7] that Congress in ANCSA expressly preserved the Federal-Indian trust relationship and rejected alternative proposals that would have transferred all federal responsibilities to the State, *id.* 21a; that Congress has included Alaska tribes in virtually all federal Indian legislation enacted after ANCSA reflecting its continuing federal superintendence, *id.* 21a-23a; and that Congress has also retained a guiding hand over the affairs of the Native corporations established pursuant to ANCSA, *id.* 23a. The Court of Appeals further noted that to the extent ANCSA is ambiguous, this Court's precedents require that "doubtful expressions be resolved in favor of the Indians." *Id.* 24a, *citing Alaska Pacific Fisheries v. United States,* 248 U.S. 78, 89 (1918).

The court concluded that "Venetie is a dependant Indian community and that, accordingly, its territory qualifies as Indian country." *Id.* 26a, 30a. The Court of Appeals

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[7] "This analysis indicates that the litmus test of federal superintendence is whether the federal government has abandoned its trust responsibilities, rather than whether the state government has been injected into tribal affairs." Pet. App. 20a. Far from abandoning its trust responsibilities, the federal government annually appropriates roughly one-half billion dollars for Alaska Native programs. *See* Brief Amicus Curiae of the Native Village of Barrow, et al. at 10-15 filed in the court of appeals.

remanded the case to the district court to "determine whether Venetie has the power to impose a tax upon a private party where the State of Alaska will ultimately pay the obligation." *Id.* 32a.

e. On January 6, 1997, the panel unanimously rejected the State's petition for rehearing, and no circuit judge voted to rehear the matter *en banc*. *Id.* 143a. With Venetie's consent the Ninth Circuit granted a stay of its mandate pending the disposition of the State's petition. *Id.* 142a.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE JUDGMENT BELOW IS SPECIFIC TO VENETIE AND DOES NOT PRESENT AN EXTRAORDINARY QUESTION WARRANTING THE EXERCISE OF THIS COURT'S DISCRETIONARY REVIEW.

1. As the decision below reflects, this case is highly fact-specific to Venetie -- it involves both the Tribe's unique history and treatment under ANCSA (a statute unique to Alaska), and the Tribe's character today. The Court of Appeals was called upon to apply ANCSA and other principles of federal Indian law to Venetie, and rested its judgment specifically on the facts pertaining to Venetie. Such a judgment does not warrant review by this Court.

Venetie opted out of ANCSA precisely to preserve the Tribe's 1943 Reservation land base.[8] As the Ninth Circuit emphasized, Congress deliberately provided for "the reunification of Venetie with its former reservation -- an assertion that is somewhat less straightforward where Native corporation land does not share such a close association with former tribal land." *Id.* 31a. Only four other remote tribes in Alaska similarly opted out of ANCSA and none of them share the same factual setting considered crucial by the court below.[9]

It is speculative for the State to conclude that the judgment below will extend to other Native communities that did not opt out of ANCSA.[10] Indeed, even Alaska's Attorney General has acknowledged that "the ruling may not

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[8] The technical revocation of the land's "reservation" status, 43 U.S.C. § 1618(a), merely permitted Venetie's lands to be conveyed in fee, and did not alter its Indian country status.

[9] *See* Pet. App. 26a ("the district court's factual findings actually support the determination that the land owned by Venetie is Indian country. We proceed to illustrate this point by examining the relevant factors of our six-pronged inquiry...."); *id.* 27a-31a (reviewing *inter alia*, the nature of the Venetie area and its use, the current and historic relationship of the area inhabitants to the Tribe, the practice of government agencies toward the Tribe, the land's ownership, the degree of cohesiveness among the inhabitants of the area, and the extent to which the lands at issue were set aside for Venetie, including the 1943 set aside of a reservation for the Tribe).

[10] Petitioner's repeated assertions that the Ninth Circuit's opinion has broad application to some 40 million acres, or roughly 11% of the State (*see, e.g.*, Pet. App. 3) is hyperbole not supported by the judgment below. Under ANCSA 20 million acres were set aside by Congress for the shareholders of Native *regional* corporations, not for Tribes, much less for Tribes like Venetie that opted out of the ANCSA land regime.

extend to other villages that did not opt out of ANCSA."[11] Not only is ANCSA a statute unique to Alaska, its singular application by the court below is unique to Venetie. As such, this case does not merit review.[12]

2. Although this case strictly involves Venetie's authority to tax activities on its own lands in its own Indian country, the State would have this Court believe far more is at stake. The State speaks colorfully of "enormous consequences," Pet. 3, "crippling the State's ability to implement crucial state-wide regulatory programs," *id.* at 4, "plung[ing] [Alaska] into ... chaos and confusion," and inspiring a "blizzard of litigation." *Id.* at 4, 10. As examples, the State claims the decision below will deny it virtually all jurisdiction in Venetie and other Indian country areas that may exist, precluding the State from regulating hunting and fishing, tribal gambling, and state taxation. *Id.* at 12.

The decision below involves none of these consequences. First, as a general proposition the issue of state jurisdiction in Indian country involves an entirely different analysis (a particularized balancing of competing interests) than the issue of retained tribal sovereignty (which survives unless and until expressly extinguished by Congress or as a necessary result of a tribe's dependent status.)

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[11] Don Hunter, *State to Seek Quick Appeal of Sovereignty Ruling*, ANCHORAGE DAILY NEWS, November 22, 1996 at 1.

[12] The Petition conveniently expounds at length on selected portions of the opinion below that are not specific to Venetie, and ignores all passages that are. But this Court reviews "judgments, not statements in opinions," and the judgment below is plainly specific to Venetie. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723 n.7 (1982).

(*Compare e.g. White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-145 (1980) (state taxation) with *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985) (tribal taxation)). Nowhere in its decision was the Ninth Circuit called upon to consider, nor did it express any opinion on, the extent of *state* jurisdiction in Venetie over any matter whatsoever. Such issues, should they ever be litigated, are for another day.

Second, the State's identified concerns are ephemeral. The State raises the specter of tribal treaty hunting and fishing rights operating outside state regulation, Pet. 12 (*citing*, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983)), even though there are presently no treaty hunting and fishing rights in Alaska, even though all Alaska Native aboriginal hunting and fishing rights (including Venetie's rights) were extinguished in ANCSA by 43 U.S.C. § 1603(b), and eventually replaced with a scheme of cooperative federalism set forth in Title VIII of the Alaska National Interest Lands Conservation Act of 1980, 16 U.S.C. § 3111 *et seq.* Under that Act, the federal government regulates and protects a subsistence priority for rural hunting and fishing on all federal public lands, waters, and interests therein, while the State regulates all other areas.[13] Thus, fish and game management is already divided along jurisdictional lines dependent on land ownership. The State even suggests an impact on public access across Native lands for hunting and fishing, Pet. 15, n. 10, conveniently

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[13] *See Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1996), *cert. denied*, 116 S. Ct. 1672 (1996); *Native Village of Quinhagak v. United States*, 35 F.2d 388 (9th Cir. 1989). As it does here, the State in *Babbitt* argued to this Court that federal regulations of federally-reserved waters would bring disaster to Alaska's fisheries. Since this Court's denial of certiorari nothing of the kind has happened, nor is even contemplated.

forgetting that (putting aside the decision below) Venetie's lands already are *private* tribally-owned lands, not public state lands.

The State also raises the specter of tribal casino gambling operating outside state regulation, *id.*, even though no tribal casino gambling is possible in Alaska since all forms of casino gambling have been prohibited under state law since 1995.[14] The State further raises the specter of a total bar to state taxation due to the Indian country ruling (1) even though ANCSA already *expressly* exempts from state taxation the undeveloped Venetie lands declared to be Indian country below, 43 U.S.C. §§ 1620(d) and 1636(c)(2)(B), and (2) even though there is not today and never has been *any* state-chartered municipality that would be in a position to impose a tax on Venetie's lands.[15]

As the foregoing discussion reflects, the State's professions of alarm are unfounded. On the facts of this case the decision below is unremarkable with unremarkable consequences. Indeed, as the State must concede, in the one area typically of greatest interest to state governments today--criminal law enforcement--the ruling below leaves unaffected the State's law enforcement machinery in Venetie by virtue of Public Law 83-280, 18 U.S.C. § 1162(a), which not only contemplates the existence of Indian country in

[14] ALASKA STAT. 15-5-100(d) (1995).

[15] The State decries the prospect of tribal taxation of Indian country lands as posing "a significant impediment to future economic development in the State." Pet. at 16, a proposition that makes no sense, for Venetie would be taxing itself and along the way discouraging others from engaging in the very economic development that is so sorely needed in Venetie.

Alaska, but expressly confers upon Alaska general criminal jurisdiction over "All Indian country within the State, except ... the Metlakatla Indian community... ."

II. THE JUDGMENT BELOW LACKS FINALITY AND DOES NOT WARRANT REVIEW AT THIS TIME.

The opinion below lacks finality. The lower courts have yet to determine whether the contested tax is, in fact, a valid exercise of Venetie's retained right of self-governance. It is for this reason that the Ninth Circuit remanded the case to the District Court for further proceedings to determine "whether Venetie has the power to impose a tax upon a private party where the State of Alaska will ultimately pay the obligation." Pet. App. 32a. The State's amended complaint further challenges the tax, among other things, as contrary to the law governing tribal regulation of non-Indians set forth in *Montana v. United States*, 450 U.S. 544 (1981), and *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), matters yet to be addressed by the District Court.[16]

This Court has long followed the practice of declining to "issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the

[16] The State has also challenged Venetie's tax on the grounds it violates the Indian Commerce and Due Process clauses of the United States Constitution, art. X, § 2 of the Alaska Constitution, and the equal protection clause of the Indian Civil Rights Act, 25 U.S.C. §§ 1302(8). *See* State's Complaint, CR-1, ¶¶ 25 & 26 at 8. These challenges must likewise be decided on remand, any one of which, if successful, may moot the ruling below.

cause." *American Const. Co. v. Jacksonville Ry.*, 148 U.S. 372, 384 (1893). The lack of finality in the judgment below may "of itself alone" furnish "sufficient ground for denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Given the limited scope of the judgment below, this case does not present any "extraordinary" circumstances mandating immediate review, and the lack of finality provides a sufficient basis for denial of the petition. *See, e.g., Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967); *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in the denial of certiorari). *See generally* Robert L. Stern, *et al.*, *Supreme Court Practice* 196 (7th ed. 1993).

III. THE NINTH CIRCUIT'S INDIAN COUNTRY ANALYSIS IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT, OTHER CIRCUIT COURTS, THE ALASKA SUPREME COURT OR THE DEPARTMENT OF THE INTERIOR'S TRADITIONAL VIEWS.

1a. The Ninth Circuit's application of the "dependent Indian community" provision of 18 U.S.C. § 1151(b) to the unique facts and legal background of Venetie is fully consistent with the analytical framework articulated by the other Circuit courts; the State's contention otherwise is simply wrong. By expressly adopting the "virtually identical" First, Eighth and Tenth Circuit approaches for identifying a "dependent Indian community" (Pet. App. 13a.), the court below deferred to the greater experience of

those other Circuits and went out of its way to seek uniformity and avoid conflict.[17]

Indeed, none of the Circuits have adopted a *per se* rule that lands *must* be owned by the federal government in order to qualify as Indian country under § 1151(b).[18] Such

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[17] Contrary to the State's assertion, Pet. 25, Venetie would have achieved the same result under the First Circuit's analysis. In *Narragansett Indian Tribe v. Narragansett Elec. Co. ("Narragansett II")*, 89 F.3d 908 (1st Cir. 1996), the First Circuit endorsed the Tenth Circuit's decision in *United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971), and the Eighth Circuit's opinion in *United States v. South Dakota*, 665 F.2d 837 (8th Cir. 1981), to determine whether private land purchased by a Tribe *outside* the tribal community for a future tribal housing project was a dependent Indian community immune from state regulation. 89 F.3d at 917. The First Circuit concluded that the project land failed both the federal set-aside and federal superintendence criteria because a finding of Indian country under such circumstances would amount to the unilateral tribal creation of Indian country without a considered decision by the federal government concerning the lands at issue. The First Circuit, however, carefully distinguished between the lands purchased by the Tribe outside its community and the nearby lands of the community acquired under the Narragansett Land Claims Settlement Act. As to the latter, the court reaffirmed that such lands *had* been set-aside and found them to be Indian country. *See Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir.), *cert. denied*, 513 U.S. 919 (1994) ("*Narragansett I*"). ANCSA likewise was a land claim settlement, and clearly under *Narragansett I* the First Circuit would reach the same conclusion, by the same mode of analysis, as did the Ninth Circuit below.

[18] *E.g., Narragansett II*, 89 F.3d at 917 ("The fact that the Tribe, not the government, owns the lands does not preclude a finding that the housing site is a dependent Indian community"); *Martine*, 442 F.2d at 1023 (Ramah community lands purchased by the Navajo Tribe with tribal funds found to be a dependent Indian community). *Cf. South Dakota*, 665 F.2d at 842 (citing *Martine* approvingly and stating "The test for determining what is a dependent Indian community must be a flexible one, not tied to any single technical standard" (citations omitted)); *Indian Country, U.S.A.*

a rule would conflict with precedents of this Court finding a dependent Indian community to exist where, like Venetie, lands are owned by a Tribe in communal fee simple. *See, e.g., United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. Chavez*, 290 U.S. 357 (1933); *United States v. Candelaria*, 271 U.S. 432 (1926).[19] Such a rule would also conflict with Congress' intent that "the terms of section 1151(b) refer to residential Indian communities under federal protection, not to types of land ownership or reservation boundaries." Felix S. Cohen, *Handbook of Federal Indian Law* 39 (1982 ed.) There is thus no intercircuit conflict demanding resolution by this Court.

b. Nor does this case call for a nationally binding pronouncement on the test for a "dependent Indian community." While neither this Court nor Congress has expressly defined the statutory term "dependent Indian community," this Court has developed "[a] clear body of [Supreme] Court precedent [that] emphasizes two central features of the inquiry into whether a given area constitutes Indian country: "first, whether the territory is 'validly set apart for the use of the Indians as such,' and second, whether the Natives who inhabit it are 'under the superintendence of the [federal] government.'" Pet. App. 6a-7a, *citing Oklahoma Tax Comm'n*; *John*; *United States v. McGowan*, 302 U.S. 535 (1938); *United States v. Pelican*,

v. Oklahoma Tax Comm'n, 829 F.2d 967, 975 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988) ("Patented fee title is [ ] not an obstacle to either reservation or Indian country status of Creek Nation lands").

[19] A rule *requiring* federal ownership of lands would effectively write the "dependent Indian community" provision of § 1151(b) out of the statute, for any community whose lands had been set aside in reservation or trust status would already satisfy the § 1151(a) "reservation" provision. *Oklahoma Tax Comm'n*, 508 U.S. at 123.

232 U.S. 442 (1914). Following these precedents, all of the Circuit courts that have addressed the issue have developed analytical frameworks that incorporate these two main elements into a more detailed functional inquiry into the nature of the community.[20] The functional approach has been embraced as a means of maintaining flexibility in addressing the diversity of Indian communities occupying Indian country from state to state.[21] Indeed, the two Circuits with the greatest experience in this area recognize that the dependent Indian community analysis "'must be a flexible one, not tied to any technical standard.'" *South Dakota*, 665 F.2d at 842 (citation omitted). "'Any single talismanic standard . . . could not be allowed to defeat the purpose of § 1151(b).'" *Blatchford v. Sullivan*, 904 F.2d

[20] *See, e.g., Blatchford v. Sullivan*, 904 F.2d 542, 548 (10th Cir. 1990), *cert. denied*, 498 U.S. 1035 (1991); *United States v. South Dakota*, 665 F.2d 837, 839 (8th Cir. 1981), *cert. denied*, 549 U.S. 823 (1982); *United States v. Cook*, 922 F.2d 1026, 1031 (2d Cir. 1991), *cert. denied*, 500 U.S. 941 (1991); *United States v. Levesque*, 681 F.2d 75, 77 (1st Cir. 1982), *cert. denied*, 459 U.S. 1089 (1982). Pet. App. 8a. This Court's consistent denial of certiorari review of the various Circuit analysis further belies the State's contention that they are in conflict.

[21] The discussion of "community of reference" in *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1543-45 (10th Cir. 1995), underscores the diversity of communities which have been found to be "dependent Indian communities." These include the scattered New Mexico pueblos that own their lands in communal fee simple, *see Sandoval*, *Candelaria*, and *Chavez*; the off-reservation Ramah Navajo community, *see Martine*; the Reno Indian Colony of Nevada, composed of several hundred Indians gathered together on a 28.38 acre tract of land, *McGowan*; a South Dakota housing project within a disestablished reservation, *South Dakota*; and a Cheyenne River Indian housing project, *United States v. Mound*, 477 F. Supp. 156 (D.S.D. 1979).

542, 546 (10th Cir. 1990) (citation omitted).[22] And while the Circuit tests may vary in expression, they are not inconsistent. As this Court recently emphasized, "the intent of Congress in 18 U.S.C. § 1151 as elucidated by [Supreme Court] decisions, was to designate as Indian country all lands set aside by whatever means for the residence of tribal Indians under federal protection, together with trust and restricted Indian allotments." *Oklahoma,* 508 U.S. at 125 (1993) (*quoting* Cohen at 34).

2. Contrary to the State's assertions (Pet. App. 20), there is no meaningful conflict between the decision below and the Alaska Supreme Court's judgment in *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988). *Village of Stevens* did not involve the issue of Indian country; it involved a contract dispute between a business and a tribal government, and the issue was whether the Tribe could defend a state court action by invoking tribal sovereign immunity from suit. Relying heavily on selective historical distinctions between Alaska Native villages and tribes elsewhere, the Alaska Supreme Court held that Stevens Village lacked sovereign immunity because it was not a Tribe.[23] 757 P.2d at 34.

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[22] *See also* Cohen at 39: ". . . 18 U.S.C. §§ 1151(a) and (b) employ a functional definition focusing on the federal purpose in recognizing or establishing a reasonably distinct location for the residence of tribal Indians under federal protection. This definition supplanted the earlier reliance on land title, which had become impractical owing to allotments, reservation openings and rights-of-way."

[23] The Alaska Supreme Court's decision was several years prior to the clarifying action of the Secretary of the Interior and of Congress confirming the federally-recognized tribal status of various Alaska Native villages including Venetie. *See e.g.,* Indian Entities Recognized and Eligible to Receive Services from the United States ("1993 Secretarial

In neither *Village of Stevens* nor any other case has the Alaska Supreme Court ever squarely had before it the issue of whether an Alaska Native village is a dependent Indian community under 18 U.S.C. § 1151(b). Nor has it revisited *any* issue involving tribal sovereignty since the Secretary's and Congress' subsequent reaffirmation of the tribal status of Alaska Native villages. There is no meaningful conflict between the Ninth Circuit and the Alaska Supreme Court on Venetie's status as a dependent Indian community.

3. The decision below does not conflict with long-standing interpretations of the Department of the Interior. To the contrary, it is consistent with the Department's long established views. In 1932, long before statehood, the Solicitor for the Department concluded that Alaska Native villages possess the inherent tribal authority to govern their own affairs, akin to the powers of tribes in the contiguous 48 states. Status of Alaska Natives, 53 I.D. 593, 605 (1932). That opinion adhered to the terms of the United States - Russia Treaty of Cession of March 30, 1867, putting Alaska tribes on an equal footing with other American tribes,[24] and

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List"), 58 Fed. Reg. 54364 (Oct. 21, 1993); Indian Entities Recognized As Eligible To Receive Services From The United States ("1995 Secretarial List"), 60 Fed. Reg. 9250 (Feb. 16, 1995). *See also,* Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 479a (under which the Secretary issued subsequent official designations of all federally recognized tribes in Alaska). As the Alaska Supreme Court acknowledges, "once the Executive Branch has determined that [a community] is an Indian tribe, which is a non-justiciable political question, the community is entitled to all of the benefits of tribal status." *Atkinson v. Haldane*, 569 P.2d 151, 163 (Alaska 1977).

[24] Art. III, 15 Stat. 539, T.S. No. 301 (making provision for the "uncivilized native tribes," and providing "the uncivilized tribes will be subject to such laws and regulations as the United States may, from time

it was also consistent with a numerous statutes, court decisions and administrative determinations both before and after 1932.[25]

To be sure, on January 11, 1993, just before the change of administrations, the outgoing Solicitor issued an opinion during the pendency of this case that ANCSA lands should generally not be considered Indian country. Not only is the 1993 opinion not long-standing nor in harmony with what came before; it has been under substantive reconsideration within the Department ever since its publication.[26] Moreover, the 1993 opinion is directly at odds with the Secretary of the Interior's long-standing treatment of Alaska Natives and their lands, especially in recent years. For instance, in 1980 the Associate Solicitor for Indian Affairs issued an opinion concluding that certain

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to time, adopt in regard to aboriginal tribes of that country"). This sentence has been held to apply the whole body of federal Indian and statutory law to the "Indian tribes of Alaska." *In re Minook*, 2 Alaska 200, 220-221 (1904) (so holding in the context of an Alaska Native citizenship petition).

[25] *See, e.g.*, Status of Alaskan Natives -- Tide Lands, 1 Op. Sol. 104, 105 (1924); Custom Marriage -- Validity -- Alaska, 1 Op. Sol. 329, 330 (1932); Liquor Traffic -- Alaska, 1 Op. Sol. 749, 750 (1937); Fishing Rights of Alaskan Indians, 1 Op. Sol. 1096, 1097 (1942); Alaskan Natives Subject To Territorial School Tax, II Op. Sol. 1196, 1197 (1943); Organization of School Districts On Indian Reservations In Alaska, II Op. Sol. 1755, 1756 (1956); *Petition of McCord*, 151 F. Supp. 132 (D.C. Alaska 1957).

[26] *See* 1993 Secretarial List, 58 Fed. Reg. at 54366 n.1; 1995 Secretarial List, 60 Fed. Reg. at 9251 n.1; (both announcing that the 1993 Solicitor's views on Indian country in Alaska are "under review").

ANCSA village corporation lands were Indian country.[27] On this basis, the Department of the Interior upheld the jurisdiction of the Village of Allakaket to enforce the federal and local Indian liquor laws within its "Indian country" territory pursuant to 18 U.S.C. § 1161. *See Rice v. Rehner*, 463 U.S. 713 (1983). Likewise, under two separate Administrations (and as recently as 1986) the Department has approved the "Indian country" liquor ordinances for three other Alaska Tribes on the same basis.[28]

Plainly the predominant view of Interior officials over the last seventy-five years is that Alaska Native villages have the same rights and governing powers, including Indian country status, as Tribes in the contiguous 48 states. The State's representations otherwise are simply contrary to the facts. Far from being "novel and untried," Pet. 12, Indian country in the form of reservations (both statutory and executive), allotments and restricted Native townsites has existed both long before and well after statehood. *See, e.g., Metlakatla v. Egan*, 369 U.S. 45 (1962); *Kake v. Egan*, 369 U.S. 60 (1962); *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949); *Petition of McCord*, 151 F. Supp 132 (D.C. Alaska 1957); David Case, *Alaska Natives and American Laws* 141-147 (Univ. of Alaska 1984); Pub. L. 83-280, 18 U.S.C. § 1162(a), 28 U.S.C. § 1360(a). Venetie itself was Indian

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[27] Liquor Ordinance, Village of Allakaket, Unpublished Opinion, Associate Solicitor of Indian Affairs (Oct. 1, 1980). The 1991 Opinion never discusses this conclusion.

[28] *See* Village of Minto Liquor Ordinance, 51 Fed Reg. 28779 (Aug. 11, 1986); Village of Chalkyitsik, Ordinance Prohibiting the Introduction, Possession, and Sale of Intoxicating Beverages, 48 Fed. Reg. 21378 (May 12, 1983); Native Village of Northway, Ordinance Providing for the Introduction, Possession, and Sale of Intoxicating Beverages, 48 Fed Reg. 30195 (June 30, 1983).

country both prior to and after statehood, first by virtue of its aboriginal title, *Bates v. Clark*, 95 U.S. 204 (1877), and later by designation of its executive order reservation, 18 U.S.C. § 1151(a). Congressional action, too, has been consistent: no fewer than 59 post-ANCSA statutes spread across 11 titles have dealt with Alaska Native villages as Indian country, including federal initiatives supporting a variety of tribal environmental, housing and law enforcement programs. *See* Brief Amicus Curiae of the Native Village of Barrow, et al. at 25-34 filed in the court of appeals.

IV. THE NINTH CIRCUIT'S HOLDING THAT CONGRESS THROUGH ANCSA DID NOT EXTINGUISH VENETIE'S INDIAN COUNTRY STATUS IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND THE CLEAR INTENT OF CONGRESS.

1. This Court's jurisprudence establishes that "congressional intent to extinguish Indian country must be reflected by clear and plain language." *United States ex rel. Hualapai Indians v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 353 (1941). "A congressional intent to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz v. Arnett*, 412 U.S. 481, 505 (1973).

The Ninth Circuit's decision is a faithful application of these precedents.[29] Given this Court's prohibition against implicit divestitures, the Court of Appeals had no choice but to conclude that ANCSA did not extinguish Indian

[29] While the State declares that the decision below conflicts with this Court's precedents (Pet. at 23), it provides no basis to support that assertion.

country in Alaska -- a conclusion shared by the leading federal Indian law treatise.[30] Simply put, nowhere in ANCSA does Congress make reference to the extinguishment of Indian country (nor inherent tribal powers such as the power to tax). On this point both the District Court and the Court of Appeals agreed. Pet. App. 71a; 32a.[31] Not only does ANCSA *not* extinguish tribal authority in Indian Country, Congress confirmed this a decade ago in the 1987 Amendments when this very issue was raised: "No provision of this Act shall ... *deny to*, any Native organization any degree of sovereign governmental authority over lands ... or persons in Alaska ... ." Congress further noted that "No provision...shall be construed to *invalidate* ... any assertion that Indian country ... exists or does not exist [in Alaska]" (emphasis added).[32] Resp. 1a-2a. Congress'

[30] *See* Cohen at 766. The State's Petition repeatedly cites the Cohen treatise for various propositions *except* the one relevant to the decision below.

[31] As the Court of Appeals correctly concluded, 43 U.S.C. § 1606(b)'s general statements could not terminate the federal superintendence necessary for continued Indian country status, given Congress' express preservation of the federal-tribal trust in 43 U.S.C. §§ 1601(c) and 1626(a), Congress' deliberate rejection of termination proposals, and Congress' continued trustee role toward Alaska tribes in dozens of statutes enacted since ANCSA. Pet. App. 21a-22a.

[32] As the House Committee on Interior and Insular Affairs observed:

> ANCSA was an Indian land claims settlement act. It was not, at the time, the intent of Congress to deal in any way with the issue of governmental authority of villages in Alaska. If village entities had tribal governing powers under existing law prior to the passage of ANCSA, ANCSA did not effect them. [sic] If they did not have such powers, ANCSA did not bestow them. It is the intent of the Committee that this

studied intent in ANCSA to remain silent and neutral on the issue of Indian country fully supports the Court of Appeals'

> is an issue which should be left to the courts in interpreting applicable law.

H.R. Rep. No. 99-712 at 27 (1986) (emphasis added). On the eve of ANCSA's passage, Alaska Senator Ted Stevens, cosponsor of both the original enactment and all its various amendments since 1971, made clear that ANCSA was not a "termination" act:

> We have basic agreement on the amount of money. We also have basic agreement on the amount of land, and we have basic agreement on the fact that the Alaska Native people themselves should have the right to self-determination. *This is consistent with the President's policy of self-determination without termination.*

117 Cong. Rec. 38440 (1971) (emphasis added). More recently, Senator Stevens noted the significance of ANCSA's earlier silence in this area:

> [ANCSA] did not terminate the special relationship between Alaska Natives and the Federal Government or resolve any questions concerning the governmental status, if any, of various Native groups. There's not one reference to sovereignty in ANCSA or in the 1971 Conference report. The Act's declaration of settlement is very clear. It extinguishes aboriginal claims of settlement and aboriginal hunting and fishing rights, and nothing more or less.

Hearings on S. 2065 before the Subcommittee on Public Lands of the Senate Committee on Energy and Natural Resources, 99th Cong., 2d Sess. 329 (1986). Although the views of one Senator may not be particularly probative, these contemporaneous views certainly undercut Senator Stevens' more recent recharacterizations of ANCSA on this issue.

conclusion that ANCSA did not extinguish Venetie's Indian country status.[33]

2. In the end, the plain fact is that ANCSA did not address, much less terminate, the Indian country status of Venetie's lands.[34] If the State disagrees, it can take its case to Congress which has the plenary and exclusive authority to rewrite ANCSA. Nearly every Congress since 1971 has returned to amend ANCSA (a total of 29 enactments since its original passage). Indeed, were it not for the State's strategic concern that legislative action would further discourage this Court from granting review, such legislative activity would already be well underway.[35] In such

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[33] The Ninth Circuit correctly understood, as this Court has stated, that "the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone." *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83 (1991). The court below declined to read into ANCSA a provision Congress expressly chose not to include. Indeed, as noted by the Ninth Circuit (Pet. App. 21a) Congress rejected legislative language that would have done precisely what the State urges here -- supplanted federal superintendence of Alaska Natives with state authority. *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. 86 (1993) ("[W]e are mindful that Congress had before it, but failed to pass, just such a scheme.... We are directed by those [enacted] words, and not by the discarded draft"). For a comparison of statutes where Congress knows well how to state its intent to terminate Indian country status, *see, e.g.*, Klamath Tribes Termination Act, 25 U.S.C. § 564(q); Menominee Tribe Termination Act, 25 U.S.C. § 891 *et seq.*; Peoria Tribe of Oklahoma Termination Act, 25 U.S.C. § 821 *et seq.*

[34] It did, however, specifically allow Venetie to keep its pre-existing Reservation in fee status.

[35] Letter of February 17, 1997, from Hon. Governor Knowles to State Senate President Miller and State House Speaker Phillips, committing not to spend appropriated funds to lobby Congress until after review by this Court since "any activities other than legal action, might well undercut

circumstances, and in addition to the other reasons for denying the Petition, this case does not warrant further review.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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our efforts to gain Supreme Court review and a favorable ruling."

APPENDIX

ALASKA NATIVE CLAIMS SETTLEMENT ACT AMENDMENTS OF 1987

Sec. 2. "The Congress finds and declares that--

(8) no provision of this Act shall--

(B) confer on, or deny to, any Native organization, any degree of sovereign governmental authority over lands (including management, or regulation of the taking fish and wildlife) or persons in Alaska;

Pub. L. 100-241, 101 Stat. 1788, 43 U.S.C. § 1601 note.

Sec. 17

(a) No provision of this Act [the Alaska Native Claims Settlement Act Amendments of 1987], exercise of authority pursuant to this Act, or change made by, or pursuant to, this Act in the status of land shall be construed to validate or invalidate or in any way affect -

(1) any assertion that a Native organization (including a federally recognized tribe, traditional Native council, or Native council organized pursuant to the Act of June 18, 1934 [the IRA] as amended) has or does not have governmental authority over lands (including management of, or regulation of the taking of, fish and wildlife) or persons within the

boundaries of the State of Alaska, or

(2) any assertion that Indian country (as defined by 18 U.S.C. § 1151 or any other authority) exists or does not exist within the boundaries of the State of Alaska."

Pub. L. 100-241, 101 Stat. 1814, 43 U.S.C. § 1601 note.

(6)

No. 96-1577

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IN THE

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OCTOBER TERM, 1996

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Petitioner,

v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Native American Rights Fund, *Indian Country in Alaska: The Venetie Decision*, in *Justice* (Spring 1997)	2, 6
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REPLY BRIEF FOR PETITIONER

1. A common tactic employed by respondents at the certiorari stage is to attempt to minimize the significance of the decision below, in the hope of avoiding plenary review by this Court. Respondents here have taken this ploy to extremes, arguing that the Ninth Circuit decision is "specific to Venetie" and "is unremarkable with unremarkable consequences." Opp. 10, 14. This Court should not be misled. In seeking to secure the Ninth Circuit's far-reaching Indian country ruling, respondents have attempted to dress a "wolf in sheep's clothing." *Williams* v. *Illinois*, 399 U.S. 235, 259 (1970) (Harlan, J., concurring) (internal quotation marks omitted).

Indeed, when not attempting to avoid plenary review in this Court, respondents' own counsel, the Native American Rights Fund ("NARF"), has proclaimed the Ninth Circuit ruling as a "landmark court decision," explaining that it

> represents a *complete and unqualified* victory for tribes in Alaska. It eliminates the argument that ANCSA extinguished the territorial power of the tribes and, therefore, *will apply to virtually all other Native villages.* Specifically, the additional powers that the Tribe will have as a consequence of Indian Country status include the authority to: • tax, zone, condemn real property, • regulate land use, • manage fish and game (although the extent of such authority is unclear), • exercise civil and criminal misdemeanor jurisdiction over tribal members, and under certain circumstances exercise civil jurisdiction over non-tribal members, as well. [NARF, *Indian Country in Alaska: The Venetie Decision*, in *Justice*, at 1 (Spring 1997) (emphasis added).]

Respondents' counsel is by no means alone in its assessment of the broad significance of this case. In the Ninth Circuit, "over 180 Native Alaskan Communities" participated in an amicus capacity because, as they put it, they "'have a vital interest in the issues presented in this appeal.'" Pet. App. 136a (quoting brief). The Ninth Circuit itself recognized "the high profile of this particular action" and that, "in light of the large number of similar Native Alaskan communities in Alaska, this is a very important case raising far-reaching issues." *Id.* 136a, 140a. Judge Fernandez emphasized that, in the wake of the decision below, "hundreds of tribes" will make "assertions of sovereignty over vast areas of Alaska," warning that this prognosis "is no imaginative parade of horribles." *Id.* 35a-36a. And, in this Court, 20 of the lower 48 States, as well as the Council of State Governments-West, have filed amicus briefs urging the Court

to review this case because of its importance, not only to Alaska but to the Nation as a whole.

2a. Respondents ground their efforts to mask the importance of the Ninth Circuit ruling in their assertion that it is "specific to Venetie." Opp. 10. There is nothing Venetie-specific, however, about the threshold Ninth Circuit rulings that (1) ANCSA does not preclude judicial designation of ANCSA lands as Indian country, Pet. App. 26a, or (2) that, in determining whether ANCSA lands may be designated as Indian country, courts should apply an *ad hoc*, six-part balancing test incorporating the Ninth Circuit's expansive federal superintendence standard, *id.* 13a. Those are the legal rulings the State challenges here. *See* Pet. i, 18-29. A plain reading of the Ninth Circuit opinion confirms that they are not limited to Venetie. *See* Pet. App. 6a-26a.

Nor can these rulings be dismissed as mere "statements in opinions." Opp. 12 n.12 (internal quotation marks omitted). As the analytical structure of the Ninth Circuit decision establishes, they are necessary predicates to the court of appeals *judgment*. *See* Pet. App. 6a, 13a, 26a, 32a. Indeed, the Ninth Circuit itself recognized that the conflicting results reached by it and the district court were the product of their "disagree[ment]" over whether ANCSA precludes judicial designation of land conveyed under that Act as Indian country, *id.* 30a—the first question presented by the petition. Pet. i. Judge Fernandez's separate opinion further underscores the threshold nature of this ruling. *See* Pet. App. 36a.

b. While it has no bearing on the threshold legal rulings challenged, respondents attempt to limit the reach of the Ninth Circuit decision by focusing on Venetie's *former* reservation status, disingenuously suggesting that the reservation—or the legal consequences of reservation status—persists today. Thus, they assert that Venetie "acquire[d] title to [an] existing reservation," Opp. i,

repeatedly refer to Venetie's former reservation status (often deleting the critical modifier "former"), *id.* 2-3, 5, 11, and assert that the Village simply "opt[ed] out of ANCSA" altogether, *id.* 5. ANCSA itself, however, proves respondents dead wrong.

ANCSA explicitly revoked all reserves in Alaska—including the former Venetie reserve—save one (Annette Island). 43 U.S.C. § 1618(a).[1] Respondents' only answer is to characterize this revocation as a "technical[ity]." Opp. 11 n.8. But such express congressional diminishment of a reservation is an act of great moment under this Court's own precedents. *See Hagen* v. *Utah*, 510 U.S. 399, 401 (1994) ("If the reservation has been diminished, then [the land] within the historical boundaries of the reservation, is not in 'Indian country.' "). This is not news to Venetie. After the Village acquired title to the 1.8 million-acre Venetie tract from the ANCSA corporations that held it, the federal government refused the Village's request to hold the land in trust, explaining that to do so would contravene "the clear expression of congressional intent in ANCSA not to create trusteeship or a reservation system." DOI Op., p. 112 n.276 (citing 1978 DOI memorandum and opinion letter). *See also* 43 U.S.C. § 1601(b) (ANCSA was intended to resolve Native claims "without creating a reservation system").

Moreover, respondents did not "opt out of ANCSA." Opp. 5. They simply chose a different benefits option established by the Act (§ 1618(a))—a one-time acquisition of land in fee simple, rather than benefits from the regional corporation established pursuant to ANCSA under state law. The land now owned by the Village initially was conveyed pursuant to ANCSA in fee to ANCSA corporations subject to *state* law. Pet. App.

[1] Venetie proposed an amendment to ANCSA that would have allowed the reservation to continue, but that amendment was rejected by Congress. *See* Pet. App. 116a.

116a-117a. The land was not conveyed to the Village until *eight* years after ANCSA was passed. *Id.* 4a, 117a. This transfer was not by any stretch of the imagination a federal set aside, but instead the "voluntary act" of state-chartered ANCSA corporations, "not joined in nor approved by the federal government." *Id.* 75a.

Accordingly, as respondents' own counsel has explained, the Ninth Circuit "holding is *not* unique to Venetie and, therefore, will apply to virtually *all* other Native villages." NARF, *Yes, There is Indian Country in Alaska*, 22 NARF Legal Rev. 1, 2 (Winter/Spring 1997) (emphasis added).[2]

3. Respondents also attempt to minimize the consequences of the court of appeals ruling. Thus, they claim that "the State's identified concerns are ephemeral" and that the Ninth Circuit decision has no impact on "the extent of *state* jurisdiction * * * over any matter whatsoever." Opp. 12-13 (emphasis in opposition). This is ridiculous. Whatever the precise scope of state jurisdiction over Indian country, it is indisputably limited—indeed, "quite limited." *DeCoteau* v. *District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 427 & n.2 (1975). Thus, no matter how this limitation manifests itself in Alaska, the Ninth Circuit decision unquestionably restricts state sovereignty. *See* Pet. 11-12.

Respondents are quite wrong in suggesting that the Ninth Circuit ruling will not have dramatic practical consequences for Alaska. Indeed, in the wake of the Ninth Circuit decision, their own counsel has published a laun-

[2] Because the decision below is not limited to Venetie, it is not surprising that in *Alyeska Pipeline Service Co.* v. *Kluti Kaah Native Village of Copper Center*, 101 F.3d 610 (9th Cir. 1996), a case involving the assertion of Indian country status over ANCSA land that was *not* a former reservation, the Ninth Circuit looked to its decision in this case for "the appropriate standard for determining whether a dependent Indian community exists." *Id.* at 613.

dry list of the "additional powers" tribes will have as a consequence of Indian country status, *Indian Country in Alaska*, quoted *supra* at 2, notably including the authority to "manage fish and game," *id.* *See* Pet. 14-15.[3] Respondents claim that the threat of tribal taxation "makes no sense," Opp. 14 n.5, but this case itself confirms that the threat is *real*, not "ephemeral," *id.* 13. So does the *Kluti Kaah* case, in which a Native village attempted to tax economically vital oil and gas activities. *See* Pet. 16 n.11. The Ninth Circuit itself, moreover, recognized that a decision in favor of the Village here "would add fuel to the engines of Native Alaskan taxation." Pet. App. 136a.

4a. Respondents are no more forthright when it comes to dealing with the multi-faceted conflict presented. The Ninth Circuit is now in direct conflict with the First Circuit over what respondents themselves concede is a "main element[]" (Opp. 19) of the dependent Indian community test—this Court's federal superintendence requirement. *Compare Narragansett Indian Tribe* v. *Narragansett Elec. Co.*, 89 F.3d 908, 920 (1st Cir. 1996) (adopting verbatim and quoting superintendence standard applied by Alaska District Court below) *with* Pet. App. 20a (rejecting same standard in favor of more expansive inquiry). This conflict is real: the Ninth Circuit itself recognized that the difference in legal standards was outcome determinative on the undisputed facts of this case. *See id.* 26a & n.5, 28a-29a; Pet. 26-27.

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[3] It is true that fish and game management in Alaska is presently "divided along jurisdictional lines" depending on whether land is federal or state/private. Opp. 13. This scheme itself, however, has been the source of litigation. The Ninth Circuit ruling stands to engraft upon it over 200 sovereign Indian enclaves, creating a "crazy quilt" (Pet. App. 36a) of federal, state, and tribal regulation, and thereby crippling any effective statewide fish and game management effort.

Respondents now attempt to distinguish *Narragansett*,[4] but their counsel offered a more candid assessment of that case, from their perspective, in the Ninth Circuit, arguing there that "[*Narragansett*'s] view [of] 'superintendence' was certainly in error," and "is simply not the law." Reply to Amicus Curiae Br. of Shee Atika, Inc., pp. 11-12, filed in *Kluti Kaah*. Respondents' own counsel, therefore, has acknowledged the direct conflict between the First Circuit position and the one respondents successfully advanced in the Ninth Circuit below. *See also* Opp. 9 & n.7 (emphasizing that Ninth Circuit rejected same standard applied in *Narragansett*).[5]

b. Respondents next assert that there is no "meaningful" conflict between the Alaska Supreme Court and the Ninth Circuit. Opp. 20, 21. The Alaska Supreme Court, however, does "not now and never has * * * recognize[d] * * * Indian country" in Alaska, *Native Village of Stevens*

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[4] Respondents argue that *Narragansett* is distinguishable because it did not involve "settlement lands." Opp. 17 n.17. But the key distinction drawn by the First Circuit in *Narragansett* was that the land in question—like Venetie—was not "placed in trust with the United States," 89 F.3d at 920, as the land subject to the Narragansett Land Claims Settlement Act—unlike the land subject to ANCSA—had been, *see id.* at 913, and, instead, was—like Venetie—held privately by the tribe in fee. Moreover, any suggestion that *Narragansett* is inapposite is refuted by the First Circuit's express reliance on the district court decision in this case. *Id.* at 920, 921.

[5] Since the petition was filed, the circuit conflict has only deepened. In *United States* v. *Adair*, 111 F.3d 770 (10th Cir. 1997), the Tenth Circuit held that an area of Oklahoma, which had been part of a 16 million-acre federal set aside to the Cherokee Indians but over time had been conveyed to Indians "restriction-free," was *not* a dependent Indian community. *Id.* at 773. In so holding, the Tenth Circuit emphasized that mere receipt of federal benefits or assistance is insufficient to establish the requisite degree of dependency, *id.* at 776-777, a conclusion with which the Ninth Circuit (Pet. App. 28a-29a) and respondents (Opp. 9 & n.7) disagree. *See also Penobscot Indian Nation* v. *Key Bank of Maine*, 1997 WL 212524, at *26 n.12 (1st Cir. May 5, 1997) (existing authorities "indicate that 'Indian Country' * * * encompass[es] Indian trust lands but not Indian fee lands").

v. *Alaska Management & Planning*, 757 P.2d 32, 35 (Alaska 1988); the Ninth Circuit in one fell swoop has made 44 million acres of Alaska newly eligible for Indian country status, overturning the established jurisdictional regime in Alaska. Pet. 20-21. Given the jurisdictional significance of Indian country status, that conflict is plainly "meaningful."

c. Perhaps respondents' most audacious assertion is that the decision below "does not conflict with longstanding interpretations of the Department of the Interior." Opp. 21. The Ninth Circuit held that ANCSA "did not extinguish Indian country in Alaska." Pet. App. 2a. The Department of the Interior—in an exhaustive, 133-page opinion directed to the precise question—has ruled that "[t]he statutory regime established in ANCSA precludes the treatment of lands received under that Act as Indian country." DOI Op., p. 131. The conflict could hardly be more clear. And, as discussed in the petition (p. 23), the Ninth Circuit's blatant disregard for the Secretary's opinion underscores the need for this Court's review. *See Aleknagik Natives Ltd.* v. *United States*, 806 F.2d 924, 926 (9th Cir. 1986) (Kennedy, J.) (Secretary of Interior's interpretation of ANCSA entitled to "considerable deference").[6]

5. Respondents briefly seek to avoid plenary review under the guise of finality. Opp. 15-16.[7] The decision below, however, finally resolves jurisdictional issues of enormous and widespread importance, bringing the State to a cross-roads. The narrow issue left for remand—a determination of the particular tax obligation that may

[6] While respondents argue that the 1993 DOI opinion has been under "reconsideration" (Opp. 22) for four years (and counting), the Department has taken pains to make clear that the opinion "has *not* been withdrawn or modified." 60 Fed. Reg. 9250, 9251 n.1 (Feb. 16, 1995) (emphasis added). *Accord* 59 Fed. Reg. 9280, 9284 n.1 (Feb. 25, 1994); 58 Fed. Reg. 54364, 54366 n.1 (Oct. 21, 1993). Thus, the conflict is not going away.

[7] This Court of course has jurisdiction to review judgments of federal courts of appeals, whether interlocutory or final. 28 U.S.C. § 1254(1).

be assessed against the State, Pet. App. 32a—will in no way affect the threshold legal rulings challenged. Regardless of the outcome on remand, the challenged rulings will remain circuit law, inviting "each and every tribe * * * to test the limits of its power over what it deems to be its Indian country." *Id.* 36a. All agree, moreover, that there is no need to reach the narrow remedial issue left for remand if Venetie does not occupy Indian country.[8] Thus, at the outset the district court preliminarily enjoined the Village's effort to collect the tax until the Indian country determination had been made, *id.* 140a, 141a, and the Ninth Circuit not only affirmed that injunction but stayed its Indian country ruling so that certiorari could be sought in this Court on the threshold questions presented. *Id.* 127a-140a, 142a.

This case therefore fits squarely into the category of interlocutory judgments the Court has seen fit to review on certiorari. *See* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, and Kenneth S. Geller, *Supreme Court Practice* 196 (7th ed. 1993) ("where * * * there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status") (citing cases). In the past Term alone, this Court has granted certiorari in numerous cases despite the interlocutory nature of the court of appeals judgment subject to review.[9]

Before Alaska is subjected to the vagaries of the Ninth Circuit Indian country regime, the State urges this Court

[8] As the Ninth Circuit put it, "[t]he ultimate question presented by this case—whether Venetie has the authority to tax activities occurring within its territory—turns on whether [it] occupies Indian country." Pet. App. 6a.

[9] *See, e.g., Inter-Modal Rail Employees Ass'n* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 117 S. Ct. 1513 (1997); *Harbor Tug & Barge Co.* v. *Papai*, 117 S. Ct. 1535 (1997); *INS* v. *Yang*, 117 S. Ct. 350 (1996); *General Elec. Co.* v. *Joiner*, 117 S. Ct. 1243 (1997) (order granting certiorari); *Arkansas Educ. Television Comm'n* v. *Forbes*, 117 S. Ct. 1243 (1997) (same).

to give the exceptionally important questions presented the benefit of plenary review.[10]

* * * *

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[10] Respondents' reliance on the 1987 amendments to ANCSA (Opp. 25-27), is entirely misplaced. Respondents quote the amendments for the propositions that "'[n]o provision of this Act shall * * * *deny to*, any Native organization any degree of sovereign governmental authority over lands * * * or persons in Alaska,'" and that "'[n]o provision * * * shall be construed to *invalidate* * * * any assertion that Indian country * * * exists or does not exist [in Alaska].'" Opp. 25 (ellipses and emphases in opposition). Tellingly, in the first quotation respondents have deleted the phrase "confer on, or" just prior to "deny to," while in the second they not only delete the critical words "validate or" just prior to "invalidate," they neglect even to denote the omission with ellipses. Pub. L. No. 100-241, §§ 2(8)(B), 17(a), 43 U.S.C. § 1601 note. *See Scott* v. *Village of Kewaskum*, 786 F.2d 338, 342 (7th Cir. 1986) ("Counsel should not use omissions in an effort to prove a point—it won't work, and it will make the rest of counsel's presentation incredible"). In addition, "the Act" referred to in the quotation is the 1987 amendments, *not* ANCSA. Whatever the case with the 1987 amendments, ANSCA was hardly "silent and neutral" (Opp. 26) on the question presented. *See* Pet. 19.

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BRIEF OF THE LEGISLATURE OF THE STATE OF ALASKA AND THE COUNCIL OF STATE GOVERNMENTS-WEST AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici are the Legislature of the State of Alaska and the Council of State Governments-WEST.[1] Composed of 20 Senators and 40 Representatives duly elected by all Alaskan citizens, the Legislature has the duty under the Alaska Constitution to formulate and enact laws in the

[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* and their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk.

best interests of the State and its constituents. The Council of State Governments-WEST ("CSG-WEST") is a nonpartisan association of western state legislators and legislative staff in 13 western states and four Pacific island governments. Its primary objectives are to provide a platform for regional cooperation and collaboration among western state legislatures and to strengthen the role of states within the federal system.

In the wake of the Ninth Circuit's startling decision, it is impossible to determine which geographic areas of the State are amenable to the laws of the State. The Legislature now faces the prospect of 226 distinct land-based, quasi-sovereign entities covering tens of millions of acres of the Alaskan landscape and claiming powers to tax, regulate economic affairs, and override existing state regulatory laws in various areas, including those protecting and preserving natural resources. This uncertainty cripples the Legislature's ability to regulate matters of vital importance to the citizens of Alaska and undermines its efforts to further the public interest.[2] In addition to hamstringing the Legislature, the confusing decision issued by the court of appeals will foment a "blizzard" of litigation over the State's and Native governments' respective spheres of authority. That litigation will sap the limited resources of both the State and the Native communities that unquestionably could be put to better use.

Amici endorse the State's petition in this case and believe that the State has convincingly demonstrated why the decision below warrants review by this Court. *Amici* are filing separately to focus the Court's attention on the extraordinary and harmful impact the decision will have

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[2] Ironically, this uncertainty may also discourage businesses, such as the contractor involved in this case, from engaging in development opportunities in these areas.

on the Legislature's ability to fulfill its responsibilities to all Alaskan citizens and to make clear that the impact of the decision in this case will be felt by legislatures in addition to Alaska's. The acute consequences to the legislative process of the decision below reinforce the strong case for certiorari already made by the State. For these reasons, the views of the *amici* should further inform the Court's judgment as to whether to grant the petition.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision disregards the traditional relationships between Alaska Natives, the State of Alaska, and the Federal Government and, as set forth in the State's petition, employs a six-part, "textured" inquiry that varies from the analyses and decisions of this Court and several courts of appeals regarding the meaning of "dependent Indian communities." The decision undercuts a major legal premise on which the Legislature has patterned its governance for much of the State and its citizens. And, as also described in the State's petition, the panel decision effects a sharp and unprecedented detour from the line of cases instructing that the existence of "dependent Indian communities" requires federal superintendence over land set aside for the use and occupancy of an Indian tribe, which simply does not describe—and never has described—the situation in Alaska.

1. The jurisdictional implications of this case for Alaska are huge. The Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. § 1601 *et seq.*, authorized the federal government to convey patents covering tens of millions of acres of land to state-chartered regional and village corporations. 43 U.S.C. §§ 1606, 1607. This 44 million acres of land—all of which is now potentially "Indian country" under the Ninth Circuit's rationale—is dispersed widely throughout the State and includes 226 villages containing significant Native and non-Native pop-

ulations. See Pet. 4-5; 58 Fed. Reg. 54,364.[3] The establishment of a particular area as Indian country will affect, among many other things, management of education, protection of natural resources, aid to local and municipal governments, the provision of services, and the amount and degree of economic opportunity. Accordingly, while the amount of land at issue is by itself of a magnitude sufficient to justify granting the petition, *e.g.*, *Andrus* v. *Utah*, 446 U.S. 500, 506 (1980), its significance for the people of Alaska and its governing bodies is even more compelling.

Within Indian country, a Native government may have authority over a wide range of subjects, including management of fish and game, *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324 (1983); regulation of economic relationships, *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); and taxation "to raise revenues for its essential services," *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982). See generally *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980). Because a Native government may be authorized to tax entities doing business within its jurisdiction, Native governments can require financial contributions from companies extracting natural resources from land—a matter of extreme importance in Alaska. See *Pittsburg & Midway Coal Mining Co.* v. *Watchman*, 52 F.3d 1531, 1538 (10th Cir. 1995).[4] The

[3] *Amici* have lodged with the Clerk of the Court as demonstrative aids two maps of the State of Alaska showing the lands selected by and/or conveyed to the village corporations and the locations of the Native villages.

[4] There is very little decisive case law on the certainty or totality of Native jurisdiction in these areas. *See* Felix S. Cohen, *Handbook of Federal Indian Law* chs. 4, 5 (1982 ed.). This makes the Ninth Circuit's decision all the more harmful to Alaska because it overlays the unsettled questions of state-tribal jurisdiction onto the amorphous jurisdictional inquiry into what constitutes Indian country now mandated by the court of appeals. The inevitable effect will be costly and unpredictable litigation.

holding below threatens severely to undermine the Legislature's ability to fulfill its constitutional mandate across a spectrum of areas in which it crafts laws for the benefit of the State and its citizens. See *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 209-10 (1987) (state precluded from enforcing "civil regulatory" statutes in Indian country).

a. The Alaska Constitution charges the Legislature with managing and preserving the State's abundant natural resources, and management of these resources is fundamental to the State of Alaska's ability to ensure the long-term health and stability of its economy and environment. This issue was of paramount importance to those who enabled Alaskan statehood. See Alaska Const. art. VIII; An Act to Provide for the Admission of the State of Alaska into the Union, Pub. L. No. 85-508, § 6, 72 Stat. 339, 340-41 (1958); *Udall* v. *Kalerak*, 396 F.2d 746 (9th Cir. 1968). The scope of the Legislature's responsibility in this area is as vast as the State itself, extending to management of, *inter alia*, fish and game, Alaska Stat. tit. 16, and public waterways, Alaska Const. art. VIII, §§ 13, 14; and maintenance of environmental quality standards, Alaska Stat. tit. 46. See Pet. 15-16.

Resource management is just one element of the Legislature's wide-ranging responsibility under the State Constitution to protect the environment for the benefit of all Alaskans. The decision below affects a panoply of state environmental statutes and regulations. See Pet. 15. One example is the creation and enforcement of environmental quality standards, where the ramifications of the Ninth Circuit's holding will extend beyond the boundaries of Indian country to envelop as well the surrounding communities. Disabling the State from enforcing ambient air or water quality standards in Indian country will affect people both within *and* without these jurisdictional boundaries.

b. One particular area where the impact of the holding below will be felt acutely is management of forest resources. The Legislature has devised a comprehensive scheme to administer and manage the State's forests, which "are among the most valuable natural resources of the state." Alaska Stat. § 41.17.010; see *id.* tit. 41, ch. 17 ("Forest Resources and Practices"). This chapter empowers the Commissioner of Natural Resources to adopt regulations covering an array of forest practices, *id.* § 41.17.080, including riparian management to protect fish habitats, *id.* §§ 41.17.115-.119; control of infestations and disease, *id.* § 41.17.082; harvesting practices, *id.* §§ 41.17.083, 41.17.090; and the use of potentially harmful chemicals, *id.* § 41.17.100. The Ninth Circuit's decision threatens to gut this vitally important aspect of the State's resource management program with respect to millions of acres. By divesting the Legislature of plenary authority in this area, the decision below may lead to clear cutting of forest areas with serious consequences, including destruction of wildlife habitats and hastening of soil erosion. This crippling of the Legislature's ability to preserve the State's ultimate resources—its lands, waters, and wildlife—warrants granting the petition.

c. Another area rife with confusion in the wake of the Ninth Circuit's decision is taxation. Tribes have some ability to tax people and entities doing business and owning property in Indian country. *Jicarilla Apache Tribe*, 455 U.S. 130; *Confederated Tribes of Colville*, 447 U.S. 134. There is, therefore, a corresponding diminishment of the State's ability realistically to tax persons, property, or businesses in Indian country. See *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Ramah Navajo Sch. Bd., Inc.* v. *Bureau of Revenue*, 458 U.S. 832 (1982). The taxation issue is most stark in the instances where points of transit between commerce centers are potentially Indian country, such as Cantwell and Glennallen. These are bottlenecks—*i.e.*, points along the principal thoroughfares connecting the

origination and destination points of substantial commerce within the State. In these communities, Indian country classification may authorize the local Native governments to levy taxes upon the stream of commerce passing through the jurisdiction, Pet. App. 137a, thereby leaving the State powerless to protect that flow of commerce.

As the Ninth Circuit itself acknowledged, its decision imposes "a significant financial burden" on the State. Pet. App. 136a. Businesses justifiably will be reluctant to invest capital if they are subject to uncertain tax liabilities, resulting in a loss of valuable economic opportunity in areas that would benefit from such investment. And, with the Legislature's inability to predict with any certainty its tax liabilities to Native governments, it will be forced to manage the State's finances without reasonable certainty. The only certain result is a dramatic increase in litigation involving taxation of persons, businesses, and commerce in each of the 226 communities.[5] See *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992). Here, as in *Yakima*, "[i]f the Ninth Circuit's [] test were the law, litigation would surely engulf the States' annual assessment and taxation process, with the validity of each levy dependent upon a multiplicity of factors that vary from year to year, and from parcel to parcel." *Id.* at 267-68. The confusion and uncertainty sown by the decision in this case warrant review by this Court.

d. In addition to creating enormous uncertainty for the State of Alaska and its legislature, the Ninth Circuit's decision will spawn needlessly divisive, complex, and expensive litigation in Alaska and every other State containing land now susceptible to classification as "Indian country" under the Ninth Circuit's *ad hoc* approach. Application of the Ninth Circuit's approach will potenti-

[5] A recent example is the Village of Kluti Kaah's effort to tax operation of the Trans-Alaska Pipeline. *Alyeska Pipeline Serv. Co.* v. *Kluti Kaah Native Village*, 101 F.3d 610 (9th Cir. 1996).

ally subject non-Natives and non-Indians to tribal jurisdiction within their communities. *Strate* v. *A-1 Contractors*, 117 S. Ct. 1404, 1413 (1997). Ironically, the Ninth Circuit's decision furthers precisely the opposite objective from that motivating efforts by Congress and this Court to define Indian country, namely, avoiding confusion and promoting certainty with respect to spheres of jurisdiction. Felix S. Cohen, *Handbook of Federal Indian Law* 6 n.56 (1942 ed.) (goal of definition is to render "the limits of Indian country . . . at all times obvious and certain") (quoting H.R. Rep. No. 23-474, at 10 (1834)); *United States* v. *La Plant*, 200 F. 92, 94 (D.S.D. 1911) ("It is important to definitely know over what land the state courts have jurisdiction and over what land the federal courts have jurisdiction"). As illustrated by the State's petition, see Pet. 28-30, the jurisdictional confusion generated by the decision below warrants further review.

2. The Ninth Circuit decision not only creates enormous confusion and uncertainty for Alaska, but is also predicated on an erroneous view of the history of the relationship between Alaska Natives and the State government, including the regulatory role that the State has always exercised with respect to Alaska Natives and rural lands and the extent to which the State has provided extensive benefits and services to Native peoples and their rural communities. This history highlights the fact that the federal government has never had the pervasive "guardianship" relationship with respect to Alaska Native communities that is the benchmark of "dependent Indian community" status.

The unique relationship between Natives, the Territory and State, and the federal government reveals a dynamic fundamentally different from the relationship between Indians in the "lower 48" and the federal government, which has been marked by conflict, forced migration, and treaties made and broken. *United States* v. *John*, 437 U.S. 634, 638-47 (1978); Felix S. Cohen, *Handbook of Federal Indian Law* 62-127 (1982 ed.). This different political

and legal relationship is, in part, a product of the vast land area of Alaska and the resulting "relative lack of intense or continuous competition and conflict over land or resources." U.S. Dep't of the Interior, *Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers*, Sol. Mem. Op. 36975, at 16 (Jan. 11, 1993) ("DOI Op."); *Metlakatla Indian Community, Annette Islands Reserve* v. *Egan*, 369 U.S. 45, 50-51 (1962).

Alaska Natives historically have occupied a different position with respect to the federal government than Indians in the contiguous United States, and the federal government has not applied woodenly the lessons learned from past experience in Alaska. DOI Op., at 20-22. The federal government's policy toward Natives did not center upon the land they occupied because it was not a scarce resource under pressure from an expanding population. Federal legislation concerning Natives classified them not on the basis of tribal organization but, rather, as "having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district." *Metlakatla Indian Community, Annette Islands Reserve* v. *Egan*, 362 P.2d 901, 918 (Alaska 1961) (describing Act of May 1, 1936, 49 Stat. 1250, 25 U.S.C. § 473a), *vacated on other grounds*, 369 U.S. 45 (1962). Thus, while various Acts of Congress recognized the existence of Native land claims, federal legislation did not place the federal government in a posture of superintendence over land occupied by Alaska's Natives. Instead, the federal government recognized the State as the primary actor in forging a social and political contract with Alaska Natives.

With the possible exception of the Metlakatla reservation in Southeast Alaska (the only Native reserve lands remaining after ANCSA, 43 U.S.C. § 1618(a)), the State, rather than the federal government, has always been recognized to have legal and political jurisdiction over Alaska Natives and their communities, as well as the land and re-

sources in and around those communities.[6] *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 62-63 (1962). Although the Statehood Act preserved Alaska Native land claims by requiring a State disclaimer of right and title to such property, the disclaimer "by the State was a disclaimer of proprietary interest rather than governmental interest." *Id.* at 68-69.

The Ninth Circuit's decision pays no heed to this history and simply ignores the broad range of programs, benefits, and services that the State currently provides to Alaska Natives—including the people of Venetie. Certain of these initiatives are referenced in the decision by the District Court below, Pet. App. 62a-63a. They include programs tailored to the specific needs of Natives as well as more generic public welfare and assistance programs. See Pet. App. 67a & n.28. The State's abiding commitment to these programs, benefits, and services belies any notion that the Native Villages, including Venetie, are "dependent" on the federal government.

Under the Alaska Constitution, public education is a State responsibility. Alaska Const. art. VII, § 1 ("The legislature shall by general law establish and maintain a State"). Because of that requirement, as interpreted by Alaska's courts and implemented in a State-wide settlement more than 20 years ago, the State has built modern public school facilities in all rural villages with

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[6] The Ninth Circuit's analysis of ANCSA was misguided from the beginning because it assumed as its point of departure that "Indian country" generally existed in Alaska prior to the enactment of ANCSA. Pet. App. 13a, 32a; *see Native Village of Stevens* v. *Alaska Mgmt. & Planning*, 757 P.2d 32, 35 (Alaska 1988) (" 'There is not now and never has been an area of Alaska recognized as Indian country with one possible exception' ") (quoting *Metlakatla*, 362 P.2d at 920); *United States* v. *Nelson*, 29 F. 202 (D. Alaska 1886) (recognizing that Congress had authority to declare parts of Alaska to be Indian country); *United States* v. *Kie*, 26 F. Cas. 776 (D. Alaska 1885); *United States* v. *Seveloff*, 27 F. Cas. 1021 (D. Or. 1872).

significant student populations, to minimize the need for rural, predominantly Native children to leave their homes and villages to obtain an education. See *Hootch* v. *Alaska State-Operated Sch. Sys.*, 536 P.2d 793 (Alaska 1975). The Legislature has appropriated tens of millions of dollars over the last 20 years for those construction efforts. See Alaska Stat. §§ 14.11.005-.135; Alaska Admin. Code ("AAC") tit. 4, ch. 33 (school capital grants program); 4 AAC 31 (school facility planning and construction). Ironically, this case arises out of Venetie's attempt to tax the construction of a public school at State expense. Pet. 38a, 87a. In addition, the State provides substantial operating funds for rural education under a public school funding formula. See Alaska Stat. tit. 14, ch. 17; 4 AAC 09 (school foundation funding formula). Those funds are provided to local school districts in areas of the State where these districts have been established, and otherwise through Regional Educational Attendance Areas in unorganized boroughs. Alaska Stat. §§ 14.08.011-.151, 14.12.010-.180.

The Legislature also has acted to meet other needs of Alaska's rural communities. The State has established programs for rural electrification projects (19 AAC 96.200-.260), utility improvement grants (19 AAC 97.300-.430), and electrical service extension grants (Alaska Stat. § 42.45.200; 19 AAC 97.500-.550). In addition, the State engaged in a power cost equalization grant program, which directly subsidizes the cost of electricity in rural areas. Alaska Stat. §§ 42.45.110-.190; 19 AAC 97.200-.270. Moreover, because of the expense of purchasing and storing bulk fuel for heating and electrical generation in rural areas, the State has established a bulk fuel loan program. Alaska Stat. §§ 42.45.250, 44.47.145; 19 AAC 96.300-.365.

The State has long had a revenue sharing program under which it distributes a significant amount of State revenues to municipal governments, unincorporated communities, and Native villages. Alaska Stat. tit. 29, ch. 60; 19

AAC 30, 44. In addition, the State has provided capital construction funding grants to many such communities. Alaska Stat. §§ 29.60.400-.440; *id.* tit. 37, ch. 6. The State also has development assistance programs targeted specifically to rural areas, including general rural development assistance (Alaska Stat. §§ 44.47.130-.140; 19 AAC 60), and a rural development initiative fund (Alaska Stat. §§ 44.47.800-.820; 19 AAC 70). See also Pet. App. 67a n.28.

Particularly telling in light of this broad-based legislative effort by the State is the Ninth Circuit's own statement that "[i]n many respects, the federal government has been replaced by either the State or the Tribe itself as the direct provider of services." Pet. App. 28a. This acknowledgement alone should have dispelled any notion that the Natives are "dependent" upon the federal government or that there exists federal superintendence over the Natives. See *supra* 8-11; Cohen, *supra* (1942 ed.), at 405.[7] Instead of according this history its appropriate weight, the Ninth Circuit embarked on a re-engineering of the "dependent Indian communities" inquiry that departs from the decisions of this Court and several courts of appeals.

3. The Court should grant review because the Ninth Circuit's decision is entirely at odds with this Court's prior decisions. *E.g.*, *United States* v. *Sandoval*, 231 U.S. 28, 40-41 (1913). The decision disregards the intent of Congress in enacting ANCSA *not* to create dependent, much

[7] ANCSA reaffirms this view, explicitly disavowing any "wardship" and seeking "maximum participation by Natives in decisions affecting their rights and property." 43 U.S.C. § 1601(b). To support its contrary conclusion, the court below relied upon mere receipt of federal funds or assistance by the Natives of Venetie—*e.g.*, the federal government's continuing involvement in contributing money for the construction of airports—to show the Natives' dependence." *But see* DOI Op., at 116-17. As the State demonstrates, this analysis is in direct conflict with the First Circuit's decision in *Narragansett Indian Tribe* v. *Narragansett Electric Co.*, 89 F.3d 908 (1st Cir. 1996). Pet. 25-26.

less-exclusive jurisdictional, relationships between Alaska Natives and the federal government with respect to lands conveyed to State-chartered Native corporations.[8] Straying far afield from the decisions of this Court and other courts of appeals, Pet. 23-29, the Ninth Circuit's decision effects a sharp, unprecedented detour from the principle that the existence of a "dependent Indian community" hinges on Congressional and Executive branch intent that the federal government exercise primary superintendence over land set aside for the use and occupancy of an Indian tribe.

The Ninth Circuit eviscerated the historical touchstones of the "dependent Indian community" test, and its reformulated inquiry is so malleable as to be incapable of producing consistent—much less predictable—results. Pet. 29. The reference to "dependent Indian communities" in 18 U.S.C. § 1151 embodies a term of art rooted in this Court's decisions in *Sandoval*, 231 U.S. 28, and *United States* v. *McGowan*, 302 U.S. 535 (1938). In both cases, the Court described the Indians as truly "dependent"—*i.e.*, incapable of seeing to their own needs and reliant upon the federal government for protection. *McGowan*, 302 U.S. at 538 ("[t]he fundamental consideration . . . in establishing this colony has been the protection of a dependent people"); *Sandoval*, 231 U.S. at 40-41 (Pueblo Indians "are dependent upon the fostering care and protection of the Government"); see also *United States* v. *Chavez*, 290 U.S. 357, 361 (1933) (Pueblo Indians "are essentially a simple, uninformed and dependent people"); *United States* v. *Pelican*, 232 U.S. 442, 450 (1914) (" '[t]hese Indians are . . . in a condition of pupilage or dependency' ") (quoting *United States* v. *Rickert*, 188 U.S. 432, 437 (1903)). These and other cases formed the basis for the codification of "dependent Indian com-

[8] Indeed, Congress's decision in ANCSA to convey title to these Native-owned corporations *belies* any notion that Congress viewed the Natives as dependent.

munities" in the U.S. Code. Pub. L. No. 80-772, ch. 53, 62 Stat. 683, 757 (June 25, 1948) (codified at 18 U.S.C. § 1151 *et seq.*); see Reviser's Note to 1948 Act (referencing cases).

The Ninth Circuit's treatment of *Sandoval* illustrates the degree to which the Ninth Circuit has strayed from this Court's precedents. The Ninth Circuit relied on *Sandoval* for the proposition that Indian country may exist on lands held in fee simple by a tribe. Pet. App. 11a. But there, Congress had explicitly declared that the land at issue was Indian country, 231 U.S. at 37-38, continuing a long history of dependence between the Pueblo Indians and the federal government, *id.* at 47. This Court held in *Sandoval* that Congress was within its authority in classifying the lands as Indian country, and it emphasized that "the questions whether, to what extent, and for what time [Indian communities] shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts." *Id.* at 46-47. By contrast, the Ninth Circuit's decision foists an unprecedented and unwieldy methodology for determining the existence of Indian country onto courts to be applied on a case-by-case basis.

4. The Ninth Circuit did more than contravene this Court's precedents and deviate from the collective judgment of several courts of appeal; it plainly misinterpreted ANCSA. See 43 U.S.C. § 1601(b). Congress, with substantial input from Alaska Natives and State leaders, designed ANCSA to resolve fully claims of aboriginal title to land asserted by Alaska Natives in a manner that would "maxim[ize] participation by Natives in decisions affecting their rights and property" while not establishing "racially defined institutions . . . or lengthy wardship or trusteeship." 43 U.S.C. § 1601(a), (b). ANCSA's withdrawal of public lands and regime of conveying fee simple interests in lands to state-chartered corporations—rather than tribes—"reflect[ed] a new approach on an unprecedented scale in defining the relationship between Alaska Natives and the Federal Government." DOI Op., at 107. The Ninth Circuit disregarded this new approach, as well as the intent of Congress. *See County of Yakima*, 502 U.S. 251.

The patent conveyance regime conceived by ANCSA stands in sharp contrast to the *sine qua non* of Indian country—*viz.*, land set aside for the use of Indians under federal superintendence. *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991); *McGowan*, 302 U.S. at 539; *Pelican*, 232 U.S. at 449 ("the original reservation was Indian country simply because it had been validly set aside for the use of the Indians as such, under the superintendence of the Government"); *Sandoval*, 231 U.S. at 40-41 (describing government actors as "superintendents"); *Donnelly* v. *United States*, 228 U.S. 243, 269 (1913) (Indian country is "a tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation"); *Weddell* v. *Meierhenry*, 636 F.2d 211, 213 (8th Cir. 1980) ("crucial consideration" of dependent Indian community inquiry is "whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples") (citations and internal quotation marks omitted).[9]

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[9] As demonstrated by the facts of this case, which are not in dispute (Pet. App. 26a n.5), each of the remaining 225 communities covered by ANCSA could organize a tribal government as a recipient for title to the land held by the Village corporations. Pet. App. 2a, 4a, 128a. While the conveyance of property from these corporations to Native villages may be permissible, it is inconceivable that Congress would have used this convoluted approach—*i.e.*, creating as recipients of title state-chartered corporations so that these corporations could convey title to the tribes—as the means of creating or preserving Native jurisdictional claims to land, much less that Congress would have done so had it intended to create "Indian country" in Alaska. In fact, Congress plainly intended no such result.

Congress intended in ANCSA for a settlement of Alaska Native land claims that departed from the historic reservation or trusteeship models and reaffirmed the absence of federal superintendence over the lands conveyed. See Pet. App. 23a (regional and village corporations "will not be subject to Federal supervision except to the limited extent provided in the bill") (quoting H.R. Rep. 92-523 (1971), *reprinted in* 1971 U.S.C.C.A.N. 2192, 2199). Instead, ANCSA provided for state-chartered regional and village corporations as recipients of title to the land conveyed under the Act. 43 U.S.C. §§ 1606, 1607. ANCSA disavowed the paternalistic scheme of federal supervision marking the federal government's relations with Indians in the lower 48 and manifested Congress's intent to *disclaim* federal superintendence over the land conveyed to those Native corporations. See DOI Op., at 121 ("It would be anomalous to conclude that Native Corporation lands are the jurisdictional equivalent of reservations, when Congress specifically abolished reservations and designed a comprehensive system of landholdings purposely intended not to be the functional equivalent of reservations").[10]

The Ninth Circuit's manipulation of the superintendence requirement emphasizes the need for this Court to address the increasing divergence in opinion among the courts of appeals as to the correct meaning of super-

[10] Other aspects of ANCSA make it clear that Congress did not intend to create Indian country in authorizing the conveyance of 1.2 million acres of lands to Village corporations in fee simple. For instance, ANCSA included specific provisions precluding State or local taxation of *undeveloped* settlement lands. 43 U.S.C. § 1620(d). If Congress intended ANCSA settlement lands to be Indian country, those provisions would be entirely unnecessary. *Cf. Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 613 (1977) ("most reasonable inference" from inclusion of prohibition of intoxicants on land in reservation opened by Congress "is that Congress was aware that the opened, unallotted areas would henceforth not be 'Indian country,'" since intoxicants were generally prohibited in Indian country).

intendence in the Indian country context. Pet. 24-27. Indeed, the Ninth Circuit's decision conflicts with *Narragansett Indian Tribe* v. *Narragansett Electric Co.*, 89 F.3d 908 (1st Cir. 1996), where the First Circuit stated that "'[s]uperintendence by the federal government, and the consequential political dependence on the part of the tribe, exists for purposes of section 1151(b) where the degree of congressional and executive control over the tribe is so pervasive as to evidence an intention that the federal government, not the state, be the dominant political institution in the area.'" 89 F.3d at 920 (quoting District Court's opinion in this case). See also *Buzzard* v. *Oklahoma Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir. 1993) ("Superintendency over the land requires the active involvement of the federal government"; Indian country did not exist where "[t]he federal government has not retained title to this land or indicated that it is prepared to exert jurisdiction over the land").

The historic jurisdiction of the State over Alaska Natives and their communities and surrounding lands, and the breadth and depth of the assistance that the State Legislature consistently has provided to the Natives and their villages—all of which the court below ignored—undermine the argument that the villages are in any sense "dependent" on, or under the superintendence of, the federal government. ANCSA was not intended to change the jurisdictional relationship between the State and the lands eventually selected and conveyed by patent. The State Legislature responded to ANCSA by providing important benefits for rural communities because Congress made clear that the federal government's role would be limited. By redefining these historic relationships based on a misreading of ANCSA, the court below has needlessly upset the economic and political situation in Alaska in a way that will generate extraordinary confusion and potentially will result in the Villages receiving fewer net benefits. Given that these potential consequences arise out of a clear disregard of Congress's intent, an exacerba-

tion of the division among the courts of appeals, and a departure from this Court's precedents, the Court should grant the petition, reverse the decision below, and reaffirm what has always been presumed to be true—that the State has paramount authority throughout all non-federal lands in Alaska.

* * * *

As Judge Fernandez observed, the Ninth Circuit has set the stage for a torrent of litigation. Pet. App. 35a. It has unleashed tremendous anxiety throughout the State of Alaska and beyond. The ultimate consequences of the decision below for Alaska and many other States are unknowable, but, in any event, the Alaska Legislature will be severely hampered in its ability to make meaningful laws that will have their intended effects. Issues as fundamental to the State as natural resource management and taxation cannot be resolved with any confidence concerning the efficacy of an adopted course of action and, instead, will be the subject of abiding litigation. Accordingly, the Court should provide further review and thereby spare Alaska and its citizens the disruption that invariably will flow from the court of appeals' ill-considered decision.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICI CURIAE* STATES OF CALIFORNIA, ALABAMA, ARIZONA, COLORADO, FLORIDA, TERRITORY OF GUAM, ILLINOIS, LOUISIANA, MICHIGAN, MISSISSIPPI, MONTANA, NEVADA, NEW YORK, NORTH CAROLINA, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, OHIO, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, UTAH, VERMONT AND WYOMING IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI* STATES

As the result of a judicial decision that greatly expands the scope of "Indian country," the States of the Union are again left with confusion and uncertainty as to their own jurisdiction and sovereignty.[1] The Ninth

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[1] Each amici State either already has or may in the future have within its borders lands recognized as Indian country. States

Circuit Court of Appeals has brought into the ambit of Indian country (and thus *out* of the ambit of most state jurisdiction) vast amounts of land in the State of Alaska. It has done so by departing from accepted understandings of what has been a difficult concept from the beginning: the notion of a "dependent Indian community."

The States strongly urge this Court to grant certiorari, as it presents an issue of exceptional importance nationally. The Court of Appeals has vastly expanded the scope of "Indian country," in derogation of state sovereignty. While construing the congressional settlement act relating to Alaska Native land claims, the Ninth Circuit rested its construction on its reading of another federal statute, 18 U.S.C. 1151, defining "Indian country," and on the judicially-created standards that have evolved with it. The court did so in conflict with decisions of other Courts of Appeals and in a manner inconsistent with administrative decisions of the Department of Interior, relied upon by federal and state agencies. It can only lead to protracted litigation, which, in turn, may divest States of civil and criminal jurisdiction on lands within the borders of those States where that jurisdiction historically has applied. Such divestiture of state sovereignty may include the loss of the ability to enforce state criminal codes, to apply a state's civil laws in a uniform manner, to tax and even-handedly regulate routine activities on those lands, and to protect the state's natural resources, environmental quality and consumer health and safety.

States may also face assertions of tribal authority to tax, to regulate the land of non-members, to subject non-

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expect such recognition to occur by congressional action, yet, this case raises the prospect that such recognition also may occur through judicial decrees following protracted and complex litigation, without any such congressional action. Those United States Commonwealths and Territories joining this brief express the same concern that congressional intent has been blatantly disregarded in this case.

members to tribal court adjudications, to engage in gambling activities, and to control timbering, mining, water use, hunting and fishing in this newly-determined "Indian country," thereby affecting the state's resources and environmental quality. States face untold litigation costs in meeting these claims.

The difficulty arises from the Court of Appeals' broad and erroneous formulation of what constitutes a federal "set aside" for purposes of finding a "dependent Indian community" under 18 U.S.C. 1151(b) and its assumption that federal "superintendence" exists where there is an on-going trust relationship between any Tribe and the United States and virtually *any* federal regulation or assistance given to a Tribe. The standard adopted by the Ninth Circuit would require a finding of a "dependent Indian community" where there is minimal federal involvement, control, or regulation with the land in question, and even where the land is privately owned and Congress has disclaimed federal control.

The relevance of this broad and unprecedented formulation of the "dependent Indian community" standard to the other States is clear and ominous. Indian Tribes on the East Coast, in the Midwest and South, and in California, Oregon, Washington, Wyoming and Idaho have acquired land in fee to expand their landholdings. Nothing prevents a Tribe from acquiring lands in States other than where the Tribe is principally located, including in States which currently have no recognized Indian country. These lands generally are subject to state and local civil and criminal authority and taxation powers. However, even though these lands may be purchased "unilaterally," i.e., solely by the Tribe as fee lands, some measure of federal involvement, approval or restraint on alienation may accompany these acquisitions. The States face uncertainty as to whether Tribes may claim "Indian country" status for these lands, displacing state authority and jurisdiction. The States vitally need this Court's guidance in the form

of reliable and predictable standards to determine whether a "dependent Indian community" exists.

SUMMARY OF ARGUMENT

This Court should grant review of this Ninth Circuit decision for three principal reasons. First, the appeals court so grossly misconstrued ANCSA as to cast into doubt and unpredictability amici States' expectations concerning Indian legislation. Congress intended an entirely new approach in ANCSA, that eschewed traditional reservations and trust lands, yet, the Ninth Circuit disregards the clear intent of Congress and finds "Indian country," displacing traditional state powers. Amici States adopt Alaska's arguments as to this matter.

Second, the decision below presents federal statutory issues of extraordinary importance to the States by vastly expanding the scope of Indian country in derogation of state sovereignty. The Ninth Circuit relied upon an ill-defined and little understood concept of "dependent Indian community" to find Indian country. This Court has not addressed "dependent Indian community" since *United States v. Sandoval*, 231 U.S. 28 (1913), and *United States v. McGowan*, 302 U.S. 535 (1938), both of which were decided before the enactment of 18 U.S.C. 1151(b), which codified the term as one of three statutory categories of Indian country, the others being reservations and allotments. Without the guidance of this Court since 1938, it has been up to other courts to provide *ad hoc* standards for defining "dependent Indian community," leaving amici States in confusion and doubt as to when and where Indian country may be "carved" out within their borders. The law is fractured and only this Court can make uniform the legal standards here.

Finally, the Ninth Circuit ignores the tests set forth by the Eighth and Tenth Circuits, and specifically rejects the First Circuit's requirement that, for a dependent Indian community to be judicially recognized, Congress must

evince an intention *that the federal government, not the state, be the dominant political institution in the area. Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908, 920 (1996). The Ninth Circuit allows for a judicial recognition of lands as Indian country where Congress may have rejected trust or reservation status for the land, where that land is held by the tribe in fee as the result of a unilateral acquisition, and where state and local governmental political institutions predominate over the federal government. This flies in the face of other Circuit decisions and suggests this Court's review.

ARGUMENT

I. THE NINTH CIRCUIT HAS RADICALLY MISINTERPRETED THE INTENT OF CONGRESS IN THE ALASKA NATIVE CLAIMS SETTLEMENT ACT, WARRANTING THIS COURT'S REVIEW

As explained by the petitioners in this case, the Ninth Circuit has radically misread the express intent of the Congress in its passage of the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. 1601 et seq. Amici States are alarmed by this blatant disregard for the intent expressed by Congress, in ANCSA, which may have ominous implications not only for Alaska, but for the lower 48 States. Amici States agree with and adopt the arguments of Alaska with respect to the unprecedented character of the congressional act transferring land to the state-chartered Native corporations in settlement of Native land claims. As the U.S. Department of Interior concluded when it studied the issue, there is no question but that Congress intended an entirely new approach in ANCSA, unparalleled in federal Indian relations, which specifically eschewed traditional reservations and trust lands, and which significantly displaced federal and Native governmental authority with state authority. See Department of Interior, Sol. Op. M-36975, January 11, 1993, at 107-112. It is astonishing to think that the Ninth Circuit could read ANCSA to provide just the opposite.

Additionally, as Alaska argues, the Ninth Circuit's misconstruction of ANCSA conflicts with the decisions of the Alaska Supreme Court, as well as an Interior Department Solicitor's Opinion that exhaustively reviews the legal status of lands that were the subject of ANCSA and concludes that the ANCSA-transferred lands are not Indian country. Department of Interior. Sol. Op. M-36975, January 11, 1993. The Ninth Circuit's decision flies in the face of this exhaustive, definitive and well-reasoned reading of ANCSA given by the Department charged with its implementation, the Department of Interior, and that provides one strong reason for this Court to grant review in this case. *Morton v. Ruiz,* 415 U.S. 199, 201-202 (1974). This is a case of extraordinary importance in part because it is one where a grossly incorrect statutory interpretation has extraordinary implications nationwide.

II. THE NINTH CIRCUIT'S DECISION PRESENTS FEDERAL STATUTORY ISSUES OF EXTRAORDINARY IMPORTANCE TO THE STATES BY VASTLY EXPANDING THE SCOPE OF INDIAN COUNTRY UNDER 18 U.S.C. 1151 IN DEROGATION OF STATE SOVEREIGNTY

The Ninth Circuit in this case has adopted such broad standards for finding a "dependent Indian community" (and thereby "Indian country") under 18 U.S.C. 1151(b) as to allow courts to attach that legal status to lands long understood not to be Indian country and which are otherwise subject to state civil and criminal laws. While the Ninth Circuit's construction of one statute, the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.*, is not the subject of decisions of other Courts of Appeals, its conclusion that the land at issue is a "dependent Indian community" rests on the court's sweeping construction of another federal statute, 18 U.S.C. 1151(b). It is here that the Ninth Circuit departs so significantly from the reading given this statute by other courts and federal and state agencies. The Ninth Circuit's broad and unjustified definition of "dependent Indian community"

significantly affects the States and presents an unacceptable conflict in principle between the Courts of Appeal that require resolution by this Court.

In 1948, Congress acted to define "Indian country" in the criminal code, as

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, . . . (b) all dependent Indian communities . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished, . . .

18 U.S.C. 1151. The statute was designed to consolidate numerous conflicting and inconsistent provisions of law into a concise statement. Reviser's Note, Act of June 25, 1948, c. 645, 62 Stat. 757.

When assessing whether it is state or tribal powers that may apply to lands claimed by Indians, this Court has informed us that the inquiry starts with "whether the land is Indian country." *Oklahoma Tax Commission v. Sac and Fox Nation,* 508 U.S. 114, 125 (1993), citing *Oklahoma Tax Commission v. Citizen Band of Potawatomi Tribe of Oklahoma,* 498 U.S. 505 (1991). Because Congress, in section 1151, simply provided broad categories of Indian country, without giving qualifying requirements or standards, it has been for the courts to provide them. This Court has repeated its fundamental test for "Indian country" over time, rejecting any crucial distinction among the forms of Indian country: "Rather, we ask whether the area has been 'validly set apart for the use of Indians as such, under the superintendence of the Government.'" *Oklahoma Tax Commission v. Citizen Band of Potawatomi Tribe of Oklahoma,* at 511, quoting *United States v. John,* 437 U.S. 634, 648-49 (1978). This language, in turn, derives from this Court's earlier decisions in *United States* v. *McGowan,* 302 U.S. 535, 539 (1938), and *United States v. Pelican,* 232 U.S. 442, 449 (1914). It is this requirement of both "set aside" and "superintendence," then, which is essential to determining whether

lands are in fact Indian country and essential in the test for "dependent Indian community." The failure of the Ninth Circuit to properly apply these requirements is the heart of the problem in the *Venetie* decision.

This Court has not specifically addressed the notion of a "dependent Indian community" since its decisions in *United States v. Sandoval*, 231 U.S. 28 (1913) and *United States v. McGowan*, 302 U.S. 535 (1938). Both of these cases were decided before the enactment of section 1151(b), which simply codified the term from the case law as one of three statutory categories of Indian country. In *Sandoval*, this Court construed a congressional act designating the lands held by the New Mexico Pueblos as "Indian country," notwithstanding title was held, not by the United States Government, but by the Pueblos themselves, following the Treaty of Guadalupe Hidalgo. *Id.*, at 37-39. In describing the circumstances of that case, this Court noted the United States exercised various controls, authority and its "fostering care and protection over all *dependent Indian communities* within its borders . . . ." *Id.*, at 46 (emphasis added).

In *McGowan*, this Court examined whether an Indian colony on lands owned by the United States, purchased out of funds appropriated by the Congress in 1917 and 1926 to provide lands for needy non-reservation Indians in Nevada, qualified as Indian country. *United States v. McGowan*, 302 U.S. at 537. Relying on the language in *Sandoval*, the Court noted that the Colony was (1) under the superintendence of the federal government; (2) the government retained title to lands; and (3) the government had authority to enact regulations and protective laws for the lands. *Id.*, at 539.

A "reservation" is undoubtedly the principal form of Indian country, established by congressional or executive action.[2] A "dependent Indian community," however, ap-

[2] Creating reservations is the principal means by which the federal government establishes Indian country and presents the fewest problems in the analysis of where tribal jurisdiction applies and where state jurisdiction is limited. *See* Spaeth, *American Indian Law Deskbook*, 35 (U. Colo. 1993). In the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. 461-479, Congress delegated to the Secretary of Interior the power to acquire and designate new lands set aside for Indians as reservations. 25 U.S.C. 465, 467. It appears this is the standard means of establishing new Indian country.

pears to be the exception to the rule. Since the passage of section 1151(b), the identification of a "dependent Indian community" on lands not explicitly designated as Indian country by either the Congress or the Executive has fallen to the *judicial* branch. In the absence of guidance from this Court or from the Congress, other courts have applied various judicially-evolved tests to determine whether certain lands qualify under section 1151(b). *United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971); *United States v. South Dakota*, 665 F.2d 837, 839 (8th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982); *see United States v. Mound*, 477 F. Supp. 156, 160 (D.S.D. 1979) ("test for determining what is a dependent Indian community must be a flexible one, not tied to any single talismanic standard . . ."). Unfortunately, the Ninth Circuit's test is so flexible as to provide no practical guidance at all, leaving the States in utter confusion as to when certain lands are or are not Indian country.

The consequences of a judicial finding that Indian country exists on lands within a state not previously understood to fall within that status are profound. Foremost, the application of the state's criminal laws, an area "where States historically have been sovereign," falls into doubt. *United States v. Lopez*, —— U.S. ——, 115 S. Ct. 1624, 1632 (1995). The " 'historic police powers of the States' are not displaced by a federal statute 'unless that was the clear and manifest purpose of Congress.' " *Id.*, at 1640 (concurring op. of Kennedy, J., quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).) Here, Congress exercised its plenary power in Indian affairs by defining Indian country (and thereby

allowing the displacement of the States' criminal laws), but it has done so in part with an undefined term, "dependent Indian community." It has been left to the courts to define it in round after round of litigation. Yet, as between federal and state powers, "citizens must have some means of knowing which of the two governments" to assign political responsibility. *United States v. Lopez,* 115 S. Ct. at 1638 (concurring op. of Kennedy, J.). Confusing and conflicting judicial decisions interpreting congressional intent obscure the assignment of political responsibility no less than congressional acts which do so directly. *See FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992).

The displacement of most state criminal law when Indian country is established or recognized is generally well understood. *Worchester v. Georgia,* 31 U.S. (6 Pet.), 515, 561 (1832); *United States v. Kagama,* 118 U.S. 375, 381-82 (1886). Congress has provided for federal criminal jurisdiction *within Indian country* for the general laws of the United States as to the punishment of offenses, 18 U.S.C. 1152, various "major" crimes, 18 U.S.C. 1153, and for liquor-related prohibitions, 18 U.S.C. 1154-56, in cases involving offenses by or against Indians.[3] Congress has provided that a few States, including Alaska, shall have criminal jurisdiction as to offenses committed by or against Indians on Indian country the same as off Indian country. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, 18 U.S.C. 1162 ("Public Law 280," or "P.L. 280").[4] However, even as to P.L. 280 states, that

[3] Numerous other federal laws are directed to Indian country, which also serve to displace state criminal law or to assimilate it and leave to federal prosecution, e.g., 18 U.S.C. 437, 1158, 1159, 1163, 1164, 1165, 1166-68.

[4] Congress has also conferred criminal jurisdiction on certain states with respect to Indian country offenses for specific Tribes under statutes other than P.L. 280, e.g., Act of June 30, 1948, ch. 759, 62 Stat. 1161 (Iowa); 18 U.S.C. 3243 (Kansas); *id.*, 232 (New York); *id.*, 1747 (Florida); several statutes conferring same on Oregon as to specific Tribes.

jurisdiction is limited by court rulings and subsequent congressional acts. *Bryan v. Itasca County,* 426 U.S. 373, 379 (1976); *California v. Cabazon,* 480 U.S. 202, 209-210 (1987) (P.L. 280 authorizes criminal jurisdiction only with respect to criminal-prohibitory, not civil-regulatory laws; only criminal laws of statewide application and not local criminal codes apply); *Pfingst v. Sycuan Band of Mission Indians,* 54 F.3d 535, 539-540 (9th Cir. 1995), 18 U.S.C. 1166(c) ("gaming" offenses in P.L. 280 states the subject of exclusive prosecution by the United States.)

Thus, when courts recognize as Indian country lands not previously recognized as such, they essentially "carve out" of the State its most cherished and traditional police power, that of enforcing its criminal laws equally among its citizens.

Additionally, a judicial recognition of Indian country deprives a State of its ability to apply its civil laws in a uniform manner, to tax and regulate routine activity on those lands, and to protect the state's natural resources, environmental quality and consumer health and safety. See Petition, pp. 14-15. Of particular importance to States is their jurisdiction to impose environmental laws and regulations consistently and uniformly throughout the State for the protection of the state's resources and its citizens. Significant State jurisdiction may be lost when a court recognizes Indian country. *See Washington Dep't of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985). In turn, states may face assertions of tribal authority to tax, to regulate the land of non-members, to subject non-members to tribal court adjudications, to engage in gambling activities, and to control timbering, mining, water use, hunting and fishing in this newly-recognized "Indian country," thereby affecting the state's resources and environmental quality.

These jurisdictional questions are of vital importance to the nation and the States of the Union. The Ninth Circuit decision here lightly regards the tremendous im-

pact its decision has in the expansion of Indian country in Alaska *and* the lower 48 States. It allows the recognition of Indian country willy-nilly, and is so broad as to suggest Indian country recognition where there is the "mere presence of Indians in a particular area . . ." *see United States v. Martine*, 442 F.2d at 1024.

III. THE NINTH CIRCUIT'S DECISION ALSO CONFLICTS WITH THE FIRST CIRCUIT BY EXPRESSLY REJECTING THAT COURT'S REQUIREMENT THAT "SET ASIDE" AND "SUPERINTENDENCE" ARE MET ONLY WHEN THE FEDERAL GOVERNMENT, NOT THE STATE, IS THE DOMINANT POLITICAL INSTITUTION IN THE AREA.

Since *McGowan*, decided by this Court in 1938, it has been left to other federal and state courts to provide meaning for the term "dependent Indian community." *McGowan* not only required the superintendence of the federal government, it referred to the government retaining title to lands and having the authority to enact regulations and protective laws for the lands. 302 U.S. at 539. Nonetheless, after the passage of 18 U.S.C. 1151(b), the Tenth Circuit in *United States v. Martine*, 442 F.2d at 1023-24, set forth a three-part test, drawing on factors derived from this Court's holding in *Sandoval*, 231 U.S. at 45-49, requiring analysis of: (1) the nature of the area in question; (2) the relationship of the inhabitants of the area to Indian Tribes and the federal government, and (3) the established practice of government agencies toward the area. In *Martine*, the court, with no analysis, summarily found a dependent Indian community on lands purchased with tribal funds from a corporate owner, and relied on the findings of the trial court as to the elements of the three-part test above.

The Eighth Circuit in *South Dakota* slightly re-fashioned the test, incvorporating the *Martine* test only in its second

prong,[5] but setting forth key elements for analysis, including whether there is federal title, retention of federal authority, and the "set aside" and "superintendence" elements. In *Venetie*, however, the Ninth Circuit completely re-writes the Eighth Circuit test by dropping reference to federal "title," finding that unimportant, suggesting instead that the courts look to the "degree of federal ownership and control." It labels its test more "textured" than the district court's, which generally followed *South Dakota*. In rejecting the Eighth Circuit's tests, the Ninth Circuit has added to the confusion and disarray in the understanding of when and where Indian country exists.

While the court in *South Dakota* found a dependent Indian community on lands that were the subject of a HUD-financed housing project, it importantly included in its test the *McGowan*-derived "title" element (the *federal government* held the land in trust for the tribe) and the *Mound*-derived "set aside" element (the land was designated for use for the Tribe's Low Rent Housing Project).

The First Circuit Court of Appeals in *Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908

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[5] The Eighth Circuit offered a four-part test: (1) whether the United States retained *title* to the lands and retains authority to enact regulations and protective laws as to those lands, citing *Weddell v. Meierhenry*, 636 F.2d 211, 212 (8th Cir. 1980); *cert. denied*, —— U.S. ——, 101 S. Ct. 2024, 68 L.Ed.2d 329 (1981)); (2) the nature of the area in question, the relationship of the inhabitants of the area to Indian Tribes and the federal government, and the established practice of government agencies toward the area, 636 F.2d at 212, *citing United States v. Martine*; (3) whether there is an element of cohesiveness there, 636 F.2d at 212-13, *citing United State v. Morgan*, 614 F.2d 166, 170 (8th Cir. 1980); and (4) whether the land has been set apart for the use, occupancy and protection of dependent Indian peoples, 636 F.2d at 213, *citing United States v. Mound*, 477 F. Supp. 156, 158 (D.S.D. 1979), *citing Youngbear v. Brewer*, 415 F. Supp. 807, 809 (N.D. Iowa 1976), *aff'd*, 549 F.2d 74 (8th Cir. 1977). *United States v. South Dakota*, 665 F.2d at 839.

(1st Cir. 1996), has provided the most faithful rendition of the factors set forth by this Court before section 1151 was passed and the factors articulated in previous cases by that court and other Courts of Appeals. In *Narragansett*, the court follows its earlier suggestion that in lieu of relying upon a definition of "dependent Indian community," the court should "conduct 'a financial inquiry into the nature of the community,' weighing a series of factors established by case law." 89 F.3d at 917, quoting *United States v. Levesque*, 681 F.2d 75, 77 (1st Cir. 1982). *Narragansett* followed *South Dakota* and analyzed each factor accordingly. Ultimately, and most critically, the court found that there was no federal set aside, the requirement set forth in the fourth element of the *South Dakota* test. It adopted a view that a "set aside" must be tied to the requirement in *McGowan*, *Pelican* and *Mound*, that the land must be under the superintendence of the federal government. The *Narragansett* noted this must be

> 'where the degree of congressional and executive control over the tribe is so pervasive as to evidence an intention *that the federal government, not the state, be the dominant political institution in the area.*'

89 F.3d at 920, emphasis added, quoting the District Court decision in this case, *Alaska v. Native Village of Venetie*, 1995 WL 462232 (D. Alaska Aug. 2, 1995) at 14, reversed in this case. While the federal government engaged in various programs in *Narragansett*, such as BIA financial assistance and the HUD housing projects, there was no evidence that Congress intended that the federal government have a role there as the dominant political institution.

The Ninth Circuit in *Venetie*, however, expressly rejects the requirement that the federal government be the dominant political institution in the area. In its more "textured" approach, it allows virtually *any* federal activity in the area, flowing from the government's on-going trust relationship with Indians and Native Alaskans, to constitute the kind of "superintendence" that satisfies the set-

aside requirement. However, mere federal government "involvement" can be found in any matter involving Native Americans, or, for that matter, in any level of governmental activity, state and local. By rejecting the "dominant political institution" elements adopted by the First Circuit, the Ninth Circuit stands in stark conflict with the *Narragansett* court and provides no threshold level of federal activity to determine what constitutes "superintendence."

The *Narragansett* court also looked to *Buzzard v. Oklahoma Tax Commission*, 992 F.2d 1073 (10th Cir. 1992), for the significance of the United States taking land into trust as indicia of a federal intent to "set aside" the lands for the Indians, as such, and wherein federal control will become dominant. While *Narragansett* noted that federal title is not a prerequisite, *see Martine*, 44 F.2d at 1023, it noted lack of federal title weighed against the Tribe's claim. 89 F.3d at 921. *Narragansett* also noted that in the majority of cases in which the land was privately held, the courts found there was not a dependent Indian community, and that in *Buzzard*, a unilateral purchase by the Tribe of lands which it then subjects to a restriction on alienation by the federal government cannot constitute the "set-aside" and "superintendence" necessary for recognition of a dependent Indian community. *Id.* Indeed, as the *Buzzard* court noted, "nothing in *McGowan* or the cases concerning trust lands indicates that the Supreme Court intended for Indian tribes to have such unilateral power to create Indian country." *Buzzard*, 992 F.2d at 1077.

The Ninth Circuit in *Venetie*, however, radically departs from the earlier judicially-evolved tests. It provides its own *ad hoc* six-part test, applying it against lands originally the subject of ANCSA. The new test, while "adding" elements, widens their scope in such a manner that virtually mandates the judicial recognition of a "dependent Indian community" where Congress could not have anticipated it. Most significantly, the court finds

that Congress in ANCSA "set aside" the lands for Alaska Natives, as such. It dismisses the express intent of the Congress *not* to create trust land or reservations for Alaska Natives, instead requiring the land be transferred to state-law corporations. Finally, the Ninth Circuit dismisses the notion that the superintendence must relate in any way to the land, but instead, need only go to Indian people. This disengagement of superintendence from the land permits a finding of dependent Indian community to arise from ordinary relationships that the federal government has with Indians in general.

In short, with its disregard for the elements of federal title and federal governmental dominance, elements mandated by other Circuit Courts of Appeals, the Ninth Circuit has left the States with no predictability on matters which greatly and directly affect their sovereignty and and jurisdiction. The States of the Union need this Court's guidance on "dependent Indian community"—the one category of Indian country which is ill-defined to begin with and which now has been made the subject of further confusion.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1996

STATE OF ALASKA,

Petitioner,

v.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE HONORABLE THEODORE F. (TED) STEVENS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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Walters v. Campbell, 1 Alaska Fed. 91 (D. Ore. 1876) 4

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Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958) 11

Federally Recognized Indian Tribe List Act, Pub. L. No. 103-454, Title I, 108 Stat. 4791 (1994) 10

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Indian Health Care Improvement Act, Pub. L. No. 94-437, 90 Stat. 1400 (1976) (codified as amended at 25 U.S.C. § 1601 *et seq.*) 5

Pub. L. No. 60-319, 35 Stat. 837 (1909) 7

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CONGRESSIONAL BILLS

H. R. 3100, 92d Cong., 1st Sess. (1971) 14

H. R. 10367, 92d Cong., 1st Sess. (1971) ...1, 14, 15, 16, 17

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CONGRESSIONAL REPORTS AND DOCUMENTS

H. R. Rep. No. 523, 92d Cong., 1st Sess. (1971) 17

H. R. Rep. No. 746, 92d Cong., 1st Sess. (1971) 17

S. Rep. No. 405, 92d Cong., 1st Sess. (1971) 17

S. Rep. No. 457, 47th Cong., 1st Sess. (1880) 5

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H. R. Exec. Doc. No. 1, Pt. 5, 52d Cong., 1st Sess. (1891) 6

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Alaska Native Land Claims: Hearings on H. R. 3100, et al., before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess. (1971) 14

Authorizing the Tlingit and Haida Indians to Bring Suit in the United States Court of Claims: Hearing on S. 1196 before the Senate Comm. on Indian Affairs, 72d Cong., 1st Sess. (1932) 8

TABLE OF AUTHORITIES – Continued

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Repeal Act Authorizing Secretary of the Interior to Create Indian Reservations in Alaska: Hearings on S. 2037 and S.J. Res. 162 before a Subcomm. of the Senate Comm. on Interior and Insular Affairs, 80th Cong., 2d Sess. (1948) 10

Transcript of June 21, 1971 Executive Session of the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess. (1971). Record Group 233. Center for Legislative Archives. National Archives. Washington, D.C. 16

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OTHER AUTHORITIES

Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1943 ed.) 9

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Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1982 ed.) 6

Ted C. Hinckley, *Sheldon Jackson, Presbyterian Lobbyist for the Great Land of Alaska*, Journal of Presbyterian History (March 1962) 4

Frederick E. Hoxie, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 (1984) 4

Claus-M. Naske, AN INTERPRETATIVE HISTORY OF ALASKAN STATEHOOD (1973) 11

William W. Quinn, Jr., *Federal Acknowledgement of American Indian Tribes: The Historical Development of a Legal Concept*, American Journal of Legal History (October 1990) 9

INTEREST OF AMICUS CURIAE

The Honorable Ted Stevens is the State of Alaska's senior member of the United States Senate, and a member of the Bar of this Court.[1]

Between 1956 and 1961, Ted Stevens served as Legislative Counsel, Assistant to the Secretary, and Solicitor of the U.S. Department of the Interior. In those positions, he participated in drafting the Alaska Statehood Act. When he entered the Senate in 1968, Ted Stevens was appointed to the Committee on Interior and Insular Affairs. During his tenure on the Committee, Stevens was a principal author of the Senate amendment to H. R. 10367, the bill Congress enacted in 1971 as the Alaska Native Claims Settlement Act (ANCSA). Ted Stevens also was a member of the House-Senate Conference Committee that wrote the enacted text of H. R. 10367.

In disregard of the express intent of Congress announced in numerous provisions of ANCSA, in the decision below the circuit court erroneously held that Congress intended 1.8 million acres of land in Alaska owned in fee simple by Neets'aii Gwich'in Alaska Natives to be a "dependent Indian community," and hence "Indian country," within the meaning of 18 U.S.C. § 1151. Unless corrected, the decision will irreparably harm the people of Alaska, both Native and non-Native, who until now have largely escaped the damage that

---

[1] No counsel for a party has authored this brief in whole or in part. The Alaska State Legislature will make a monetary contribution to the preparation of the brief from funds the Legislature has appropriated for its own use.

Congress's early nineteenth century Indian policies inflicted in the coterminous states, and will severely damage the institutions Congress created to implement the ANCSA settlement. For those reasons, amicus curiae urges the Court to grant the State of Alaska's petition for certiorari.

The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

In 1884, Congress established a new policy to guide its dealings with Alaska Natives, the content of which was dramatically different from its previous Indian policies. Rather than directing the President to negotiate treaties with Alaska Natives, the new policy required Natives to comply with the civil and criminal statutes to which non-Native residents of Alaska were subject. In 1912, Congress expanded that list of statutes to include enactments of the Alaska Territorial Legislature, and in 1958 to include enactments of the Alaska State Legislature. Contrary to the conclusion of the circuit court in the decision below, in 1971, Congress reaffirmed that policy through its enactment of ANCSA, by conveying forty-four million acres of land in fee simple to Native village and regional corporations organized under state law, and by subjecting the conveyed land to the jurisdiction of the Alaska State Legislature.

ARGUMENT

CONGRESS'S ALASKA NATIVE POLICY, 1884-1948

The Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, grants Congress "plenary and exclusive power over Indian affairs." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 470 (1979).

Congress initially exercised that power to accomplish a single objective: the clearing of the public domain of the Native Americans who occupied it. Congress accomplished that objective first by the Senate ratifying treaties negotiated with tribes for the cession of land; in 1830 by delegating to the President authority to remove members of tribes that occupied land east of the Mississippi River to land located west of the river, 4 Stat. 411 (1830); and then by the Senate ratifying treaties that established reservations for tribes whose members occupied land west of the river. In 1871, Congress directed the President to cease negotiating treaties. 16 Stat. 566 (1871). But Congress continued to establish reservations on which Native Americans were compelled to reside.

Alaska Natives were spared the common Native American fate.

In 1868, Congress extended its laws "relating to customs, commerce, and navigation" to Alaska, 15 Stat. 240 (1868), and in 1873 designated Alaska as "Indian country" for the narrow purpose of prohibiting the sale of

alcohol. 17 Stat. 530 (1873).[2] But Congress did not turn its serious attention to Alaska until 1880.

Since the public domain by then had been largely cleared, the principal policy objective of the members of Congress and clergymen who in 1880 were interested in Indian policy was to prepare Native Americans who had survived the clearing for citizenship. *See generally* Frederick E. Hoxie, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 (1984). The Presbyterian missionary Sheldon Jackson was both a member of that group and the principal lobbyist for Alaska residents who had petitioned Congress to grant Alaska a civil government. Ted C. Hinckley, *Sheldon Jackson, Presbyterian Lobbyist for the Great Land of Alaska*, Journal of Presbyterian History (March 1962). With respect to the Indian policy he advocated for Alaska, in a colloquy with Senator Manning Butler during the first hearing on Alaska civil government, Jackson advised as follows:

[2] In 1872 when it ordered the release of a Sitka resident who had been arrested for selling "spiritous liquor" to a Tlingit Indian, the Oregon district court noted that "because a country is inhabited or owned in whole or part by Indians" does not mean that it is "Indian country," and if, to prevent the sale of alcohol to Alaska Natives, "Congress . . . [thought] it desirable that . . . [the liquor control] provision[s] of the Indian Intercourse Act should be in force in Alaska, it can so provide. . . . " *United States v. Seveloff*, 1 Alaska Fed. 64 (D. Ore. 1872). Congress responded by enacting the 1873 Act. Three years later the same court noted that "Alaska is not 'Indian country' in the technical sense of that term any further than Congress has made it so." *Walters v. Campbell*, 1 Alaska Fed. 91, 94 (D. Ore. 1876).

> Jackson: It is not necessary that the United States should feed or clothe them [i.e., the Tlingit and Haida Indians of southeast Alaska], or make treaties with them. This enables us in our Indian policy to take a new departure; and treat them as American citizens. All that is necessary to be done is to afford them government and teachers, which they cannot procure themselves.
>
> Butler: In other words, you mean to say that if we should afford the protection of a well-organized government, they would subordinate themselves to the law of the United States. That is your idea?
>
> Jackson: That is my idea.

S. Rep. No. 457, 47th Cong., 1st Sess. 12 (1880).

In 1884 when it granted Alaska a civil government, Congress accepted Jackson's recommendations by subjecting Alaska residents, both Native and non-Native, to "the general laws of the State of Oregon," and by authorizing the Secretary of the Interior to operate schools "in the Territory of Alaska, without reference to race." Alaska Organic Act, §§ 7 and 13, 23 Stat. 24 (1884).[3]

[3] In addition to appropriating funds to the Department of the Interior for schools in Native villages, in 1915, Congress appropriated funds to enable the Department to open a Native hospital. 38 Stat. 862 (1915). From those statutes evolved the policy that Alaska Natives are to be afforded the same health care and other services that Congress provides to other Native Americans. To implement that policy, Congress has referenced Alaska Natives in statutes that establish Native American programs. *See e. g.*, Indian Health Care Improvement Act, Pub. L. No. 94-437, 90 Stat. 1400 (1976) (codified as amended at 25

Two years later, federal courts affirmed that Congress did not intend Alaska to be "Indian country." *Kie v. United States*, 1 Alaska Fed. 125 (D. Ore. 1886); *In Re Sah Quah*, 1 Alaska Fed. 136 (D. Alaska 1886). And that was the settled law when Alaska Governor Lyman Knapp in 1891 reported to Congress that:

> Since the passage of . . . [the Alaska Organic] Act, if not before, the courts assumed jurisdiction to try Indian offenders according to the laws of the United States, in no case allowing local customs among the tribes or native people to have any determining influence upon questions of punishment, as has ever been the case in the States where the tribal relation is recognized.

H. R. Exec. Doc. No. 1, Pt. 5, 52d Cong., 1st Sess. 498 (1891).

U.S.C. § 1601 *et seq.*) (Alaska Natives deemed "Indians" and Alaska Native villages deemed "Indian tribes" for the purpose of the Act). In the decision below, the circuit court concluded that "this patchwork of benefit programs demonstrates a continuing intent of Congress to maintain federal superintendence over Alaska Natives." *See* Pet. App. 22a. However, that conclusion misconstrues the blackletter rule that "a tribe may 'exist' for some purposes but not others." Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 7 (1982 ed.). Understanding that rule, Congress has treated Alaska Natives as "Indians" and has treated groups of Alaska Natives as "tribes" for the sole purpose of entitling Alaska Natives to participate in certain programs. But in doing so, Congress did not intend to alter the policy announced in 1884 and reaffirmed in ANCSA that Alaska Natives are members of the Alaska polity whose fee simple land, like that of non-Native members of the same polity, is subject to the jurisdiction of the Alaska State Legislature and its political subdivisions.

In 1899 and 1900, Congress enacted Alaska criminal and civil codes, 30 Stat. 1253 (1899); 31 Stat. 321 (1900), to which Native and non-Native Alaska residents were subject.[4]

In 1912, Congress authorized the citizens of Alaska to elect a territorial legislature, Pub. L. No. 62-334, 37 Stat. 512 (1912), to which Congress granted authority to assert jurisdiction over Alaska Natives living in Native villages. *See e. g.*, ch. 44 SLA 1913 (failure of Native parents to send their children to village grade schools made a criminal offense); ch. 11 SLA 1915 (Native Village Government Act authorizing Alaska Natives to establish "a self-governing village organization for the purpose of governing certain local affairs").

In 1924, Congress granted all Alaska Natives citizenship. Pub. L. No. 68-253, 43 Stat. 253 (1924). In response, in 1929 the Alaska Territorial Legislature rewrote its municipal code to eliminate references to noncitizen Indians and repealed the 1915 Native Village Government Act. Chs. 23 and 99 SLA 1929.[5]

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[4] In 1909, Congress authorized the appointment of village schoolteachers as "special peace officer[s]" authorized "to arrest . . . any native of the district of Alaska charged with the violation of any provisions of the Criminal Code of Alaska." Pub. L. No. 60-319, 35 Stat. 837 (1909). In 1958 in *United States v. Booth*, 161 F. Supp. 269, 273 (D. Alaska 1958), the district court noted that the 1909 Act is "evidence that Alaska Indians – even those in remote communities – are subject to Alaska territorial law."

[5] In 1913 the Legislature authorized communities "having fifty or more permanent inhabitants, exclusive of Indians, who are not citizens," to organize a municipal government. Ch. 47

That was the jurisdictional situation in 1932 when Secretary of the Interior Ray Lyman Wilbur advised Congress that

> In the United States statutes Alaska has never been regarded as Indian country. The United States has had no treaty relations with any of the aborigines of Alaska nor have they been recognized as the independent tribes with a government of their own. The individual native has always and everywhere in Alaska been subject to the white man's law, both Federal and territorial, civil and criminal.

Letter from Ray Lyman Wilbur to the Hon. Edgar Howard (March 14, 1932), *reprinted in Authorizing the Tlingit and Haida Indians to Bring Suit in the United States Court of Claims: Hearing on S. 1196 before the Senate Comm. on Indian Affairs*, 72d Cong., 1st Sess. 15-16 (1932).

And that was the jurisdictional situation in 1948 when Congress enacted 18 U.S.C. § 1151.

SLA 1913. Since most Alaska Natives were not citizens, the Legislature enacted the Native Village Government Act to enable Native residents of Native villages to organize municipal governments under territorial law. Between 1915 and 1929 "Native villages from Selawik in the northwest arctic to Angoon and Hoonah in southeast Alaska organized municipal governments under the 1915 Act. After Alaska Natives became citizens, Native villages such as Hydaburg organized municipal governments under the general laws of the Territory of Alaska." Report of the Governor's Task Force on Federal-State-Tribal Relations, p. 93.

THE ENACTMENT OF 18 U.S.C. § 1151

In 1934, Congress enacted the Indian Reorganization Act (IRA). Pub. L. No. 73-383, 48 Stat. 984 (1934). The IRA authorized "any Indian tribe, or tribes, residing on the same reservation" to adopt a constitution approved by the Secretary of the Interior, and authorized the Secretary to issue the same tribes "a charter of incorporation."

Since 1884, Congress had subjected Alaska Natives to the same civil and criminal jurisdiction to which it subjected non-Natives. For that reason, Congress had not recognized Native residents of Native villages as "tribes" whose governing bodies possessed a limited political sovereignty.[6] As a consequence, Alaska Natives were not

---

[6] "The term 'tribe' is commonly used in two senses, an ethnological sense and a political sense," and "[i]t is important to distinguish between these two meanings." Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 268 (1943 ed.). The history of Congress's recognition of ethnological tribes as tribes that have a political existence which includes a limited political sovereignty is convoluted. *See* William W. Quinn, Jr., *Federal Acknowledgement of American Indian Tribes: The Historical Development of a Legal Concept*, American Journal of Legal History (October 1990). What can be said here is that prior to 1994, Congress did not recognize that Alaska Native ethnological tribes had a political existence. In 1978 the Secretary of the Interior adopted regulations that created an administrative procedure to enable Native American groups to petition for political recognition. 43 Fed. Reg. 39,361-64 (1978) (now codified at 25 C.F.R. Part 83). In 1982 the Secretary published a list of recognized tribes that did not include Alaska Native residents of Native villages. 47 Fed. Reg. 53,130-35 (1982). In 1993 the Secretary published a new list that unilaterally reversed more than a century of congressional policy by recognizing Alaska Native residents of Native villages

eligible for many of the benefits the IRA granted to Native Americans who were members of recognized tribes.

To alleviate the disparity, in 1936 the 74th Congress amended the IRA to authorize "groups of Indians in Alaska not heretofore recognized as bands or tribes" to adopt constitutions and receive corporate charters. Pub. L. No. 74-538, 49 Stat. 1250 (1936).

Section 2 of the 1936 Act also authorized the Secretary of the Interior to designate Indian reservations in Alaska. But as Assistant Secretary of the Interior William Warne in 1948 explained to the Senate Committee on Interior and Insular Affairs, the 74th Congress did not intend the designation of a reservation to divest the Alaska Territorial Legislature of jurisdiction within the boundaries of the reservation. *Repeal Act Authorizing Secretary of the Interior to Create Indian Reservations in Alaska: Hearings on S. 2037 and S. J. Res. 162 before a Subcomm. of the Senate Comm. on Interior and Insular Affairs*, 80th Cong., 2d Sess. 26 (1948) (statement of William E. Warne, Assistant Secretary, Department of the Interior).

Congress is presumed to be "knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988).

– including the residents of respondent Native Village of Venetie – as tribes. 58 Fed. Reg. 54,364-69 (1993). In 1994, Congress enacted the Federally Recognized Indian Tribe List Act, Pub. L. No. 103-454, Title I, 108 Stat. 4791 (1994). The Act retroactively delegated the Secretary of the Interior authority to adopt his recognition regulations.

In 1948 the intent of previous Congresses that Assistant Secretary Warne summarized was the existing law about which the 80th Congress was knowledgeable, and which it did not intend to alter, when it enacted the 18 U.S.C. § 1151 definition of "Indian country." For that reason, subsequent to the enactment Executive Branch agencies consistently adhered to the view that the 80th Congress did not intend 18 U.S.C. § 1151 to apply to the Territory of Alaska. As Assistant Secretary of the Interior Roger Ernst explained to Congress in 1958: "[T]he general understanding had been that the many native villages in Alaska were not Indian country, and it had been the general practice for Territorial officers to apply Territorial law in the native villages." Letter from Roger Ernst to the Hon. Emanuel Celler (February 25, 1958), *reprinted in* S. Rep. No. 1872, 85th Cong., 2d Sess. 3 (1958).

THE ALASKA STATEHOOD ACT

In 1958 the 85th Congress enacted the Alaska Statehood Act. Pub. L. No. 85-508, 72 Stat. 339 (1958). "Between 1947 and 1956, hearings on Alaska statehood were conducted on seven different occasions in Washington and three times in Alaska. The printed record of these investigations amounted to approximately 4,000 pages." Claus-M. Naske, AN INTERPRETATIVE HISTORY OF ALASKAN STATEHOOD 151 (1973). At no time during those hearings, or during the statehood hearings held in 1957, did any witness suggest that a land withdrawal made for the benefit of Alaska Natives, either pursuant to § 2 of the 1936 Act or otherwise, was "Indian country," or that Native villages were "dependent Indian communities," as Congress intended those terms in 18 U.S.C. § 1151.

In § 1 of the Alaska Statehood Act, the 85th Congress codified that understanding by "accept[ing], ratif[ying], and confirm[ing]" the Alaska Constitution. By doing so, Congress intended Alaska residents, both Native and non-Native, their real property, and the organization of their municipal governments, both in Native villages and elsewhere, to be subject to the jurisdiction of the Alaska State Legislature.

When it enacted ANCSA, the 92d Congress reaffirmed that policy.

THE ALASKA NATIVE CLAIMS SETTLEMENT ACT

In 1884, § 8 of the Alaska Organic Act extended the Mining Law of 1872 to Alaska with the proviso

> That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them *but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.* (emphasis added)

In 1971 the 92d Congress exercised the decisionmaking authority that Congress reserved to itself in 1884 by enacting ANCSA. Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. § 1601 *et seq.*). In exchange for the conveyance of legal title in fee simple to forty-four million acres of land and the payment of $ 962.5 million in compensation, § 4(b) of ANCSA "extinguished" all "aboriginal titles" in Alaska.

When it crafted ANCSA, the 92d Congress reaffirmed the policy of previous Congresses that, since 1912, had

subjected Alaska Natives and the land within and surrounding their villages to the jurisdiction of the Alaska Territorial and State Legislatures.

In 1968 the Alaska Federation of Natives, Alaska Natives' statewide organization, presented Congress a bill which recommended that "Native groups" be afforded the "option to incorporate under the Indian Reorganization Act as an alternative to incorporation under Alaska law," as well as the option of being conveyed title to land either in fee simple "or in fee to a trustee for the native group." S. 2906, 90th Cong., 2d Sess. (1968), *reprinted in Alaska Native Land Claims: Hearings on S. 2906, et al., before the Senate Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 2-16 (1968).

Congress rejected both recommendations.

Sections 7(d) and 8(a) of ANCSA required Alaska Natives to organize corporations "under the laws of the State [of Alaska]." And § 14 required the Secretary of the Interior to issue the corporations patents that conveyed title to land in fee simple, rather than in trust.

Section 14(c)(3) also required each village corporation to reconvey "no less than 1,280 acres" within and surrounding the village "to any Municipal Corporation in the Native village or to the State in trust for any Municipal Corporation established in the Native village in the future." When read *in pari materia* with § 1 of the Alaska Statehood Act (which "accepted, ratified, and confirmed" the Alaska Constitution), § 14(c)(3) is an unambiguous expression by Congress of its intent that, post-ANCSA, the Alaska State Legislature and its political subdivisions would exercise jurisdiction both within and surrounding

Native villages and over ANCSA-conveyed fee simple land.

To ensure that there would be no misunderstanding, § 2(b) of ANCSA directed that the ANCSA settlement "be accomplished . . . without establishing any permanent racially defined institutions, rights, privileges, or obligations, [and] *without creating a reservation system.* . . . " (emphasis added). And to implement the latter directive, § 19(a) revoked the Venetie reservation and all other reserves "set aside . . . for Native use or for the administration of Native Affairs [other than the Annette Island Reserve]."

The legislative history of ANCSA is consistent with that clear expression of congressional policy.

H. R. 10367 was the bill the 92d Congress enacted as ANCSA. H. R. 3100, introduced by Rep. Wayne Aspinall, the chairman of the House Committee on Interior and Insular Affairs, was the precursor to H. R. 10367. When Alaska Governor Bill Egan testified on H. R. 3100 before the Committee's Subcommittee on Indian Affairs, he objected to Congress enacting any bill that would impinge upon "State jurisdiction" because "No Native claim to this land should be immune to the 'zoning' powers of the State, from jurisdiction over fish and game, water or air quality, or other policy, natural resource or environmental regulation." *Alaska Native Land Claims: Hearings on H. R. 3100, et al., before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess. 128-29 (1971). *See also id.* 134-35 (statement of Alaska Attorney General John Havelock).

As the following colloquy between chairman Aspinall and Rep. John Kyl demonstrates, when the Subcommittee members met to discuss the bill that the Committee on Interior and Insular Affairs would report as H. R. 10367, they agreed that Governor Egan had identified a policy concern that H. R. 10367 should address:

Kyl: I would like to guarantee as far as possible that there is no possibility that these Native reservations will be considered at any time in the future as Native reservations or Indian reservations, knowing the tremendous problems that we have because of the Indian reservations in the forty-eight adjacent states. And there is a possibility – yes?

Aspinall: This troubles me, too, because it seems that the only possible way that we can do this is to find that these villages, wherever they may be, before they can take, must be incorporated under the laws of the State of Alaska which would be a final determination of their position . . .

. . .

In other words, what my colleague is saying, if the State of Alaska has any laws on the maintenance of, enhancement of, protection of ecological values, then these citizens of Alaska should conform in those respects, too, is that correct?

Kyl: Yes.

Rep. Sam Steiger then summarized the Subcommittee members' consensus as follows:

> I think it is important that we underscore this. I will not attempt to commit the balance of this side of the aisle, but I will tell you that having nine reservations within my congressional district, and having experienced almost without exception problems that are unique only to reservation structure, problems between reservations, as between reservations and state and federal government, I would hope that we would not in the report but in the bill itself [include] language that would clearly exempt whatever is established from reservation status and I think that would be – I suspect anybody on the committee who has had similar experiences will endorse that.

Transcript of June 21, 1971 Executive Session of the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess. (1971). Record Group 233. Center for Legislative Archives. National Archives. Washington, D.C.

To codify the consensus, the House Committee on Interior and Insular Affairs included a section in H. R. 10367 that became § 2(b) of ANCSA and then explained in its report on the measure that:

> The bill does not establish any trust relationship between the Federal Government and the Natives. The regional corporations and the village corporations will be organized under State law, and will not be subject to Federal supervision except to the limited extent specifically provided in the bill. All conveyances of land will be in fee – not in trust.

H. R. Rep. No. 523, 92d Cong., 1st Sess. 9 (1971).

When H. R. 10367 passed the U.S. House of Representatives, the Senate adopted an amendment in the nature of a substitute. But embracing the House consensus, in its report on the bill that became the amendment the Senate Committee on Interior and Insular Affairs explained that: "A major purpose of this Committee and the Congress is to avoid perpetuating in Alaska the reservation and the trustee system which has characterized the relationship of the Federal government to the Indian peoples in the contiguous 48 states." S. Rep. No. 405, 92d Cong., 1st Sess. 108 (1971).

A House-Senate Conference Committee wrote the text of H. R. 10367 enacted into law. The Committee also distributed a Joint Statement which explained that "the conference committee does not intend that lands granted to Natives under this Act be considered 'Indian reservation' lands for purposes other than those specified in this Act. The lands granted by this Act are not 'in trust' and the Native villages are not Indian 'reservations.' " H. R. Rep. No. 746, 92d Cong., 1st Sess. 40 (1971).

THE ADVERSE EFFECT OF THE DECISION BELOW

In the decision below, the circuit court's lack of familiarity with Congress's Alaska Native policy is regrettable. But the circuit court had an obligation to interpret the intent of Congress embodied in ANCSA by looking "to

the provisions of the whole law, and to its object and policy." *U.S. Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993). For that reason, the court's disregard of the policy § 2(b) of ANCSA unambiguously expresses is simply inexplicable. And unless corrected, the circuit court's error will inflict untold damage on the people of Alaska, both Native and non-Native, and on implementation of the ANCSA settlement.

If the error is not corrected, political subdivisions of the State of Alaska may be divested of jurisdiction both within more than 200 Alaska communities and throughout the entire Alaska unorganized borough that Congress recognized when it ratified the Alaska Constitution. As Governor Egan feared and the 92d Congress intended ANCSA to prevent, the State of Alaska may be divested of jurisdiction over the taking of fish and game, water and air quality, and other natural resource and environmental regulation on as many as forty-four million acres of fee simple land. As the facts in the case at bar illustrate, economic activity on the same fee simple land may be subjected to taxation pursuant to the inconsistent standards of more than two hundred taxing authorities. And most importantly, Congress's decision, made in 1884 and reaffirmed in ANCSA, to establish a new Indian policy in Alaska will have been abrogated by judicial fiat.

CONCLUSION

For the foregoing reasons, amicus curiae urges the Court to grant the State of Alaska's petition for certiorari.

Respectfully submitted,

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Pro se

(20)

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No. 96-1577

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STATE OF ALASKA,
Petitioner,
v.
NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 4, 1997
CERTIORARI GRANTED JUNE 23, 1997

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

STATE OF ALASKA, *et al.*

v.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT *et al.*

No. 87-51

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1987		
Oct 07	1	Fld. Complaint and issued summons
Oct 08	2	Fld. State of AK Mot for Temporary Restraining Order w/Prop Ord w/svc
Oct 13	5	Fld. Def Mot to Dismiss w/memo in Opp to Pltf's Mot for TRO & in spt of Mot to Dismiss w/svc
Oct 13	8	Fld. Min Order re Hearing on Pltf's Mot for Temp Rest Order—GRANTED cc: csl
Oct 13	9	Fld. Temporary Restraining Order cc: csl
Oct 16	10	Fld. Temporary Restraining Order cc: csl
Oct 22	11	Fld. pltf STATE motion for preliminary injunction w/svc
Oct 26	16	Fld. Def. Memo in Resp to Pltf's Mot for Preliminary Injunction & in Reply to Pltf's Opp to Def's Mot to Dismiss w/svc
Oct 30	24	Fld. MO re O/A on Pltf's Mot for Preliminary Injunction & Def's Mot to Dismiss: Mot to Dismiss reserved by court pending further study. Mot for PI Granted except for Taxes imposed on members living in territorial limits & for airport landing fees

DATE	NR.	PROCEEDINGS
Nov 03	25	Fld. Def. Native Village of Venetie, Notice of Appeal to Order entered 10/30/87 (dkt # 24) cy: Mertz (St of AK) Anderson, Judge Kleinfeld. 9CCA.
1988		
Oct 05	31	Fld cert cy 9CCA JUDGMENT affirm DC. cy: Mertz, Anderson, Judge Kleinfeld. (87-4333)
1989		
May 12	52	Fld Defs' Answer
1990		
July 9	68	FILED Motion to Dismiss, with memorandum in suppo
July 24	70	filed Opposition to Motion to Dismiss by Pltf
Dec 10	94	FILED Motion for leave to file amended complaint by Pltf.
Dec 10	—	Lodged Amended Complaint
1991		
Feb 7	98	FILED Answer to State's Amended Complaint by Deft
1992		
June 2	123	FILED COPY OF ORDER IN F86-075CTV Consolidating Tribal Status issues for trial. cc:csl
Aug 3	128	FILED Joint statement of issues.
1993		
June 21	148	FILED cert copy of pretrial order in F86-075. cc:csl

Document #	Filed	Docket Text
154 1	08/02/95	HRH Order, Decision re: Indian Country. This court finds that the lands of the Neets'aii Gwich'in have not been set aside for Alaska Natives, as such, under the superintendence of the federal government. The court concludes that the Neets'aii Gwich'in, although a tribe, are not a dependent Indian community for purposes of 18:1151(b). Based upon the court's findings, this court concludes that the lands of the Neets'aii Gwich'in are not Indican Country; and, therefore, the Tribal Government does not have the power to impose a tax upon non-members of the tribe such as the plaintiffs. cc: cnsl in this case as well as counsel in A90-484-Civil (Kluti-Kaah).
163 1	11/28/95	HRH Final Judgment that Neets'aii Gwich'in are a sovereign Indina tribe as a matter of federal common law; that the lands of the said tribe are not Indian Country. The def's do not have the power to impose a tax upon non-members of the tribe; that any remaining claims in pltf's complaint are dsmssd as moot. Cy cnsl, O&J 9696.
164 1	12/27/95	FLD DEF 1-11 Appeal to 9CCA at dkt # 163. cc: cnsl, Judge Holland, 9CCA.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT *et al.*

v.

STATE OF ALASKA, *et al.*

No. 86-75

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1992		
June 2	65	FILED Order consolidating tribal status issues with case F87-51CIV. cc:csl
1993		
Oct 1	95	FILED Joint Statement of issues
1994		
Jan 21	126	FILED Pltf's Post-Trial Brief
Mar 14	133	FILED Native Village post trial reply brief.

DOCKET ENTRIES

Document #	Filed	Docket Text
142 1	12/23/94	HRH Order re: decision-Tribal Status, The court concludes that neither the Artic Village Council, the Native Village of Venetie I.R.A. Council, nor the Native Village of Venetie Tribal Govt have been acknowledged as tribes by the U.S. Govt. The court concludes that the Neets'aii Gwich'in are a sovereign tribe as a matter of commonlaw. The court concludes that the adoption decrees of the native courts of the Neets'aii Gwich'in tribe are entitled to full faith and credit from the State of Alaska. cc:cnsl.
151 1	02/22/95	HRH Order severing cases consolidated for trial. F86-075CI and F87-51CI are severed, and a copy of decision of 12-24-94 is ordered filed in both case files. cc:csl
152 1	02/22/95	HRH Order court will issue judgment re Venetie vs State, but not "Final". Court declines to make 54(b) determination at this time. Ft. Yukon Pltfs motion for s.j. due 5-1, Oppo due 6-1, reply 6-16, 1995. cc:csl/O&J file
153 1	02/22/95	HRH Judgment: Neets'aii Gwich'in are a sovereign Indian tribe, and State of Alaska shall give full credit to adoption decrees issued by the tribal courts, including the decree in favor of Nancy Joseph. cc:csl/ O&J file

Document #	Filed	Docket Text
182 1	01/30/96	HRH Final Judgment: Native Village of Ft Yukon is sovereign tribe, and State of Alaska shall recognize adoption decrees of the Neets'aii Gwich'in and Native Village of Ft. Yukon, including decrees issued in favor of Nancy Joseph and Margaret Solomon. cc:csl/O&J file

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ALASKA *et al.*

v.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT *et al.*

No. 96-35042

DOCKET ENTRIES

DATE	PROCEEDINGS
11/20/96	FILED OPINION: The judgement of the district court is REVERSED and this case is REMANDED to the dc to determine whether Venetie has the power to impose a tax upon a private party where the State of Alaska will ultimately pay the obligation. (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. James R. BROWNING; Dorothy W. NELSON, author; Ferdinand F. FERNANDEZ.) FILED AND ENTERED JUDGMENT. [96-35042] (ft) [96-35042]
1/6/97	Filed order (James R. BROWNING, Dorothy W. NELSON, Ferdinand F. FERNANDEZ) : denying petition for enbanc rehearing [3131325-1] [96-35042] (dg) [96-35042]
1/23/97	Filed order (James R. BROWNING, Dorothy W. NELSON, Ferdinand F. FERNANDEZ): The State of Alaska's unopposed motion to stay issuance of the mandate until final disposition by the U.S. Supreme Court is granted. [3157841-1] [96-35042] (dg) [96-35042]

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

No. A87-51 Civil

THE STATE OF ALASKA, *ex rel*, ET AL.,
Plaintiffs,

vs.

NATIVE VILLAGE OF VENETIE, ET AL.,
Defendants.

Fairbanks, Alaska

October 30, 1987

HEARING ON ORAL ARGUMENT ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND DEFENDANTS' MOTION TO DISMISS

Before the Honorable ANDREW J. KLEINFELD.

* * * *

[28] States versus White Mountain Apache Tribe, 784, Fed 2nd, 917. Ninth Circuit, 1986. Okay.

The second case is—excuse me, the United States versus the Yakima Tribal Court. This is 806 F 2nd, 853. This case is—went to the United States Supreme Court and certiorari was denied.

The case is particularly telling, I think, on the arguments requiring that we exhaust our tribal remedies first

because of the way in which sovereign immunity was addressed in this context.

It came—The Court came to the conclusion that sovereign immunity precluded the requirement to exhaust because that—an entity of sovereign immunity doesn't have to do it. And they reached the conclusion relying upon Penn Herr State School and Hospital versus Halderman (phonetic) which as the Court I am sure is aware is a case involving a sovereign immunity of the State of Pennsylvania.

So the holding of the case is very, I think—can generally be applied to the context that if the entity which is being asked to exhaust its remedies enjoys sovereign immunity, it is not required to do so in a tribal forum.

THE COURT: I'm having some trouble with the applicability of sovereign immunity here. The reason is—

MR. CUMMINGS: The State—excuse me, Your Honor.

[29] THE COURT: The reason is, and I want you to clarify this for me, as I understand this case, the Village of Venetie proposed a tax of private contractor. The only way the State gets into this is that the State, by contract with that contractor, promised that if it got stuck for taxes, the State would pick up the tab.

MR. CUMMINGS: Yes, that is correct.

THE COURT: That isn't the same as if the tribal government had attempted to tax the State in the first instance. That's the State volunteering to pick up the tab for some private person's taxes. So it's hard to see how it could use its immunity in that circumstance.

MR. CUMMINGS: Well, I certainly can, if I can disagree with your interpretation of the facts to the extent—

THE COURT: I'd like to hear the argument.

MR. CUMMINGS: Yes. The reason we believe that the sovereign immunity applies in this instance is because the incident of the tax falls fairly upon the State. In other words, those taxes that are imposed by anybody or an

incident of the construction, in other words, as if it were a sheet of plywood or if it were nails or an insurance policy that the contractor is required to carry, it's something that's factored into his bid. It increases the cost doing, you know, business.

[30] Okay. The argument is that we have a right to control the cost of doing business. And in those instances where the tax isn't applicable, they shouldn't—it shouldn't have to be paid nor should we gratuitously go along with paying taxes that are unnecessary and improper.

THE COURT: Whether it's a cost of the State in putting schools out there depends entirely on whether the State chooses to contract that way, doesn't it?

MR. CUMMINGS: No, not at all. If the tax is legally valid, then the argument would be then yes, it's one of the costs of doing business. But if it isn't legally required or appropriate, then the State shouldn't be paying it. And we're talking about a substantial amount of money here, five percent of the contract price, some $160,000.

THE COURT: The Village of Venetie has never sent a tax bill to the State of Alaska, has it?

MR. CUMMINGS: Not to my knowledge, Your Honor.

THE COURT: Okay. I understand the argument. As I understand the argument, because the State ultimately bears the financial burden, it should be able to use its sovereign immunity as a sword as well as a shield here.

MR. CUMMINGS: Yes.

THE COURT: Is that about it?

MR. CUMMINGS: Yes, sir.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

(Title Omitted)

No. F87-51 CIV.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

COMPLAINT

1. This suit challenges the authority of the defendants to impose what purports to be an Indian tribal tax on a contractor building school facilities for the Yukon Flats School District and the State of Alaska. Plaintiff is the State of Alaska, within whose boundaries the defendants reside or are located. The complaint is brought by the State both on its own behalf and on behalf of the contractor on the school project, Unalakleet/Neeser Construction JV, and the principals in that joint venture, Gerald Neeser, dba Neeser Construction Company, and the Unalakleet Native Corporation. Defendants are an entity purporting to be a tribal government, its council and its members, who claim to have authority to impose the tax; the members of the Venetie Tax Commission, who claim to have authority to collect the tax; the Venetie Village Administrator, who claims to have authority to administer the tax; and the officers and personnel of the Venetie Tax Court, who claim to have authority to enforce

the tax through judicial proceedings. This complaint maintains that the tax violates federal Indian common law, the Alaska Native Claims Settlement Act (43 U.S.C. § 1601 et seq.), the Constitution of the United States (Art.I, Sec.8, cl.3), and the Constitution of the State of Alaska (Article X, Section 2). Jurisdiction of this court is based on 28 U.S.C. §§ 1331, 2201, 2202, and the doctrine of pendent jurisdiction.

The Parties

2. The Plaintiff is the State of Alaska, a sovereign state of the United States.

3. Defendant Native Village of Venetie Tribal Government is an entity purporting to be a tribal government for the area of the former Venetie Reserve, which includes the communities of Venetie and Arctic Village.

4. Defendant Native Village of Venetie Tribal Government has at times used the title Native Village of Ventetie to refer to itself or to the area which it purports to govern.

5. On information and belief, Defendant Gideon James was the First Chief of the Native Village of Venetie Tribal Government when the acts complained of here occurred, is now the First Chief, and he also now acts as the clerk of the tax court of the Native Village of Venetie Tribal Government. He is also the "Tribal Administrator" of the Native Village of Venetie Tribal Government. He is a resident of the State of Alaska. He is being sued in both his individual and official capacities.

6. Defendant Ernest Erick is the current Second Chief of the Native Village of Venetie Tribal Government. He is a resident of the State of Alaska. He is being sued in both his individual and official capacities.

7. Defendants Gideon James, Lawrence Roberts, and Larry Williams are the members of the tax commission of the Native Village of Venetie Tribal Government. On

information and belief they are residents of the State of Alaska. They are being sued in their official and personal capacities.

8. Defendants Lincoln Tritt, John Titus, and David Case are the members of the "tax court" of the Native Village of Venetie Tribal Government. On information and belief they are residents of the State of Alaska. They are being sued in their official and personal capacities.

Jurisdiction and Venue

9. This action arises under the Constitution and laws of the United States, as more fully set out herein. Jurisdiction of this court is based upon 28 U.S.C. §§ 1331, 2201, and 2202. Venue is based on 28 U.S.C. § 1391(b).

Statement of Facts

10. On information and belief, on or about May 5, 1986, the Native Village of Venetie Tribal Government passed an ordinance purporting to impose a gross receipts tax on business activity in the vicinity of the village of Venetie.

11. The Native Village of Venetie Tribal Government adopted the tax ordinance under color of authority of tribal powers purportedly enjoyed by itself and the Native Village of Venetie.

12. The Native Village of Venetie Tribal Government and the communities and persons for whom it purports to be a tribal government do not occupy an Indian reservation.

13. The United States does not recognize the Native Village of Venetie Tribal Government or the communities or persons for whom it purports to be a tribal government as an Indian tribe capable of asserting sovereign powers over nonmembers.

14. Under a contract between Unalakleet/Neeser Construction JV and the Yukon Flats School District, Unalakleet/Neeser Construction JV engaged in remodeling and rebuilding of school facilities owned by the State of Alaska in Venetie. Under that contract, any taxes levied in connection with the project by entities other than the state, the United States, and municipalities incorporated under state law, are the responsibility of the State of Alaska, not Unalakleet/Neeser Construction JV.

15. The tax commission of the Native Village of Venetie Tribal Government has informed Unalakleet/Neeser Construction JV and Gerald Neeser that they are liable for taxes and penalties in connection with Unalakleet/Neeser's construction activities in connection with the new school facilities in Venetie. The amount claimed to be owing exceeds $161,203.15, plus interest and penalties.

16. On information and belief, the only business activity that has been subjected to the tax is the construction of new school facilities in the community of Venetie.

17. In or about February, 1987, the Native Village of Venetie Tribal Government seized equipment and property of Unalakleet/Neeser Construction JV and stated that the reason was to gain security for unpaid taxes. The property was later released but the defendants still maintain that the tax is owed and on information and belief are still prepared to seize property belonging to Unalakleet/Neeser Construction JV, the Yukon Flats School District, or the State of Alaska.

18. The Native Village of Venetie Tribal Government has begun an attempt to collect the purported tax through its Tax Court. The relief requested is a final judgment against Neeser Construction Company, Gerald Neeser, and the State of Alaska, for the amount of the tax purportedly due, with interest and penalties. On information and belief, the defendants will attempt to satisfy a judg-

ment of the Tribal Government's tax court by seizing property of Unalakleet/Neeser Construction JV, the Yukon Flats School District, or the State of Alaska unless they are enjoined from doing so.

19. On information and belief, the Native Village of Venetie Tribal Government's tax court was created solely for the purpose of enforcing the purported tax against Unalakleet/Neeser Construction JV and the State of Alaska and has conducted no other business.

20. Any tax owed on account of construction of new school facilities in Venetie will, if valid, reduce operating and maintenance funds available for that school from the Yukon Flats School District.

21. Plaintiff maintains that defendants have no jurisdiction or authority to impose a tax or tax-filing obligation against itself or against any other person or entity and that any enforcement action would be illegal and without jurisdiction or authority under either federal or state law.

First Cause of Action
Absence of Tribal Sovereignty

22. The Native Village of Venetie Tribal Government is not an Indian tribe empowered to exercise tribal sovereignty under the laws of the United States. Therefore defendants have no jurisdiction or authority to impose the tax or its implementing regulations or to take any enforcement action under color of that tax.

23. Neither the Native Village of Venetie Tribal Government nor the communities and persons for whom it purports to be a tribal government exist on an Indian reservation and neither has the authority which federal law limits to Indian reservations.

Second Cause of Action
Absence of Tribal Authority over Nonmembers

24. The tax ordinance passed by the Native Village of Venetie Tribal Government is not limited in its effect to members of the defendant organizations or the persons they purport to represent. Neither Unalakleet/Neeser Construction JV, Gerald Neeser, the Unalakleet Native Corporation, its shareholders, the Yukon Flats School District, nor the state of Alaska is a member of defendant organizations, nor do they operate within any Indian country, as that term is defined in federal law, over which the defendants legally exercise jurisdiction. Accordingly, none of the defendants is empowered to exercise tribal sovereignty over the activities of Unalakleet/Neeser JV, the State of Alaska, or any other persons not members of defendant organizations. Defendants have no jurisdiction or authority to impose their tax and/or its implementing regulations against any non-members or to take any enforcement action under color of that tax.

Third Cause of Action
Settlement Act Extinguishment

25. Any jurisdiction that the Native Village of Venetie Tribal Government might once have had to exercise tribal sovereignty over the activities of non-members or of the State of Alaska was extinguished by virtue of Section 4 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1603. Therefore defendants have no jurisdiction or authority to impose the tax or its implementing regulations or to take any enforcement action under color of that tax.

Fourth Cause of Action
United States Constitution

26. Defendants' tax, even if otherwise authorized, would violate the Indian Commerce Clause of the United States Constitution (Art. I, Sec. 8, cl. 3), the Due Process

Clause of the United States Constitution, and the Indian Civil Rights Act (25 U.S.C. §§ 1301-1303) by denying equal protection of the laws and due process. The tax is not fairly related to services provided by the purported taxing authorities and is not applied or enforced equally among all persons similarly situated as to the community of Venetie. Therefore the tax is void and unenforceable.

Fifth Cause of Action
Alaska Constitution

27. Defendants' tax violates Article X, section 2, of the Alaska Constitution, which restricts local taxing authority to State chartered cities and boroughs. There is no city or borough at Venetie. Therefore, if defendants' tax is not authorized by any federal law which preempts state law, it is void under the Constitution of the State of Alaska.

Prayer for Relief

Therefore, plaintiff asks for relief against defendants as follows:

a) that defendants and each of their officers, agents, employees, and successors, and all other persons in active concert or participation with any of them, be enjoined and restrained, both during the pendency of this litigation and permanently, from:

i) taking any action, directly or indirectly, or threatening to take any action, directly or indirectly, to enforce the defendants' tax or its regulations against any person or entity; and

ii) taking any action, directly or indirectly, or threatening to take any action, directly or indirectly, to enforce any similar tax or regulations whereby defendants purport to exercise any form of sovereign jurisdiction over any persons or entities;

b) that the court declare that defendants' tax and its regulations are invalid and void under federal and state

law and are not within the jurisdiction of any entity acting as an Indian tribe and that defendants have no jurisdiction or authority to take any action to enforce their tax or its regulations against any person or entity;

c) that the court declare that the defendant Tax Court is without authority under federal and state law and that it has no jurisdiction or authority to take any action against any person or entity;

d) that the court award plaintiff its costs and attorney fees; and

e) that the court award such other relief as may be appropriate.

DATED: December 7, 1990

CHARLES E. COLE
Attorney General

/s/ Douglas K. Mertz
DOUGLAS K. MERTZ
Assistant Attorney General
Jack B. McGee
Assistant Attorney General
William F. Cummings
Assistant Attorney General
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. F 87-51 Civ.

(Title Omitted)

ANSWER TO STATE'S AMENDED COMPLAINT

Defendants respond to the State of Alaska's Complaint in the above-captioned matter as follows:

1) As to paragraph one, admit sentences one, two, three, four and six. Deny that any of the laws cited in sentence five preclude the tribal government from taxing.

The Parties

2) As to paragraph two, admit.

3) As to paragraph three, admit.

4) As to paragraph four, admit.

5) As to paragraph five, admit sentences one and two with the qualification that Gideon James' positions were and are with the Native Village of Venetie Tribal Government. Admit sentences three and four.

6) As to paragraph six, admit with the same qualifications set forth in paragraph five.

7) As to paragraph seven, admit with the same qualifications set forth in paragraph five.

8) As to paragraph eight, admit with the same qualifications set forth in paragraph five.

Jurisdiction and Venue

9) As to paragraph nine, admit.

Statement of Facts

10) As to paragraph ten, deny. The tribal government first imposed its tax in 1978 and amended it on May 5, 1986.

11) As to paragraph eleven, deny. The Native Village of Venetie Tribal Government and the Native Village of Venetie are the same entity.

12) As to paragraph twelve, deny. The tribal government is a reservation as defined by 25 U.S.C. § 1903(10).

13) As to paragraph thirteen, deny.

14) As to paragraph fourteen, defendants lack sufficient information to admit or deny and therefore deny. Defendants specifically deny that Unalakleet/Neeser Construction are not jointly and severally liable for the taxes—along with the State of Alaska.

15) As to paragraph fifteen, admit with the qualification that the tax commission operates under the tribal government's delegation of authority.

16) As to paragraph sixteen, deny.

17) As to paragraph seventeen, deny that property was physically seized, rather it was subject to a lien. Deny that property wil be seized to satisfy the tax.

18) As to paragraph eighteen, admit sentences one and two. Deny sentence three.

19) As to paragraph nineteen, deny.

20) As to paragraph twenty, deny on the basis that defendants lack sufficient information to admit or deny.

21) As to paragraph twenty-one, deny.

First Cause of Action
Absence of Tribal Sovereignty

22) As to paragraph twenty-two, deny.

23) As to paragraph twenty-three, deny.

Second Cause of Action
Absence of Tribal Authority over Nonmembers

24) As to paragraph twenty-four, admit sentence one. Admit that plaintiffs are not members of defendants' organization. Deny the remainder of paragraph 24.

Third Cause of Action
Settlement Act Extinguishment

25) As to paragraph twenty-five, deny.

Fourth Cause of Action
United States Constitution

26) As to paragraph twenty-six, deny.

Fifth Cause of Action
Alaska Constitution

27) As to paragraph twenty-seven, deny sentences one and three.

Affirmative Defenses

1. This court lacks subject matter jurisdiction based on the doctrine of tribal sovereign immunity which bars this action against all defendants.

2. The doctrine of exhaustion of tribal remedies enunciated in *National Farmers Union v. Crow Tribe* requires that this court abstain from exercising jurisdiction and that it dismiss the action for failure to exhaust tribal remedies.

Defendants therefore request that this court dismiss this action and award to them their costs and attorney fees of responding to this action.

DATED: February 4, 1991.

Respectfully submitted,

By: /s/ Bart K. Garber
Robert T. Anderson
Bart K. Garber
of Attorneys for
Native Village of Venetie

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. F-86-75 Civil

NATIVE VILLAGE OF VENTIE IRA COUNCIL,
NATIVE VILLAGE OF FORT YUKON IRA COUNCIL,
NANCY JOSEPH and MARGARET SOLOMON,
Plaintiffs,

vs.

STATE OF ALASKA and THEODORE A. MALA,
in his official capacity as Commissioner of the
Department of Health and Social Services,
Defendants.

ORDER TO CONSOLIDATE TRIAL OF TRIBAL STATUS ISSUES RE VENETIE AND DEFERRING TRIAL OF TRIBAL STATUS ISSUES RE FORT YUKON

ORDER TO CONSOLIDATE TRIAL OF TRIBAL STATUS ISSUES RE VENETIE AND DEFERRING TRIAL OF TRIBAL STATUS ISSUES RE FORT YUKON

Upon stipulation of the parties and for good cause shown,

IT IS HEREBY ORDERED that trial on the tribal status issues pertaining to the Native Village of Venetie shall be consolidated with trial on the same issues in Case No. F-87-51 Civil; and it is further

ORDERED that a trial-setting order on the tribal status issues pertaining to the Native Village of Fort Yukon shall be taken up at a later date, either after the tribal status issues regarding the Native Village of Venetie are resolved, or earlier if deemed appropriate by the court upon its own motion or upon motion of any or all parties hereto.

Date: 5/26/92

Illegible:
Judge of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF ALASKA

F86-075 Civil
(consolidated)

NATIVE VILLAGE OF VENETIE IRA COUNCIL, *et al.*,
Plaintiffs,

vs.

STATE OF ALASKA, *et al.*,
Defendants.

NOTICE OF FILING OF WITNESS LIST AND NARRATIVE TESTIMONY

In accordance with this Court's Order for Pre-Trial Proceedings & Final Pre-Trial Conference, plaintiffs Native Village of Venetie, *et al.* hereby give notice of filing the attached witness list and narrative testimony for each listed witness.

DATED this 1st day of October, 1993.

Robert T. Anderson
ROBERT T. ANDERSON
Council for Native Village of Venetie
in Case No. F87-051 Civil

Judith K. Bush
JUDITH K. BUSH
Council for Native Village of Venetie
in Case No. F86-075 Civil

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF ALASKA

(Title Omitted)

WITNESS LIST

Plaintiffs Native Village of Venetie, *et al.*, intend to call the following witnesses to testify at trial:

1. Joan Ryan
2. Jack Campisi
3. Moses Sam
4. Jessie Williams
5. Maggie Roberts
6. Robert Frank
7. Sarah James
8. Ernest Erick
9. Eddie Frank
10. Bob Childers
11. Clarence Alexander
12. Jeff Weltzin
13. Mike Stancampiano
14. Shirley Lee
15. Will Mayo
16. Pierre Demers
17. Gideon James
18. Rick Caulfield

DATED this 1st day of October, 1993.

Robert T. Anderson
ROBERT T. ANDERSON
Council for Native Village of Venetie
in Case No. F87-051 Civil

Judith K. Bush
JUDITH K. BUSH
Council for Native Village of Venetie
in Case No. F86-075 Civil

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF ALASKA

(Title Omitted)

NARRATIVE TESTIMONY OF DR. JOAN RYAN

Dr. Joan Ryan is one of Venetie's expert witnesses. Her Report is attached hereto in lieu of narrative testimony.

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF ALASKA

(Title Omitted)

NARRATIVE TESTIMONY OF DR. JACK CAMPISI

Dr. Jack Campisi is one of Venetie's expert witnesses. His Report is attached hereto in lieu of narrative testimony.

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF ALASKA

(Title Omitted)

NARRATIVE TESTIMONY OF MOSES SAM

1. My name is Moses Sam and I was born at Venetie Lake on May 8th, 1912. I was only one year old when my father, Samuel Sam, died in 1913. My mother, Lucy Sam from Old Crow, was an Elder from the nomadic days. She raised me at Tsuk Koo (Martin Creek), a creek located between Venetie and Fort Yukon. There were a few other families there at that time; Enoch, Fredson, Old Robert, Old John, Ginnis and Sam families.

2. My mother mostly gathered fish from the creek and I would hunt small game such as rabbits, ground squirrels, and ducks. I began hunting when I was six. I can remember things she taught me even when I was very young and I always took her advice. She could do many things that usually only men did and at times, would even help out the people in Venetie. Our clothes were made from rabbit skins. We had rabbit mittens that would keep us warm; we never felt the cold. There was no school then except at Ft. Yukon so I never did go to school.

3. My father came from Arctic Village. A lot of his family moved to Circle because of inter-marriage to a man from Circle but are now almost all gone. My uncle Sandy Roberts went there, made a good living, and stayed.

4. The fishing and trapping were good at Tsuk Koo/ Martin Creek until the beaver dams ruined the water. By then, I was about 12; that would have been around 1925. Anyway, we went to Christian Village where I had a sister

who was married to Jim Christian. I had three sisters altogether but then they died at a young age. It was Jim who taught me how to hunt big animals. I went with him one day when he was hunting moose. I saw how he followed it and how the moose travelled. After he shot it, I went with him and the dog team to help him bring it home. So then, I went out to hunt moose and copied every move Jim had made when tracking the moose. But I must have been doing something different because I got skunked. I got skunked 3 or 4 times but I kept trying until I got one. That was the beginning and then I knew how to hunt moose; that is how I learned from him.

5. I married Jenny Simon from Arctic Village whose parents were Ezias and Sarah Simon. Jenny had some relatives in Venetie (Jessie Williams, John Titus, and Clara Gundrum). Like everybody else, we didn't stay in one place but moved all the time. We went where the caribou or fish were. One winter, we went all the way to Bettles. Sometimes we would stay in Arctic Village for the summer. There were not many cabins in Arctic Village back in the 20s; probably less than 10. We mostly used tents in the summer or when travelling around in the winter. We stopped moving around so much about the time the first airplane came to Arctic Village in 1936.

6. We had many children; 11, but 2 of them died. In 1938, John Fredson was worried that the Venetie school would close and so he sent for us to come there. I took the whole family to Venetie by dog team. There was a school started later in Arctic Village by Katherine Peter, but we stayed in Venetie during the 40's.

7. We lived by hunting and trapping until 1952 when I got work in Ft. Yukon as a janitor in the hospital. At that time, some people were taking general assistance but not me; I would not take it and would not let any of my family take it. When I was working in Ft. Yukon, I didn't trap too much, but I would when I went to Arctic Village. We stayed four to six years in Ft. Yukon. It

was too rough there with lots of alcohol so we left in about 1956 or 1958 and came back to Venetie.

8. The hunting ground that I have used the most is a Ddhah ghoo, Round Mountain, about 12 miles above brown grass lake. It's at the big creek where the chain of lakes are; there are some houses there that we used to live in. It's quite a way down, about half way to Venetie, on the west side, not as far as the Gold Camp.

9. I claimed my Native Allotment below Venetie at #102 on the allotment map; my wife Jenny has her allotment north of Venetie in another place we used, at #101; my children Edward, Rose, Sam and Timothy all have their allotments on the Wind River closer (to Jenny's allotment at #'s 100, 104, 105, and 45, respectively.

10. The Elders have taught us to waste nothing of the animal. When we first moved to Christian Village, I learned from Chief Christian to make sure that every part of the animal was brought back to camp. Back then, I didn't understand why we had to do all that. When I asked my mother about it, she said that once when she was young, there had been some very hard times. Because of these bad times, they were so grateful to get an animal that they would use every part of it. They would clean it, treat it, and preserve it with respect as best as they knew how.

11. The most important part of their lives was preserving food for future survival. There was a fish trap to catch fish, then the fish would be dried so it can go with the people when they hunt sheep. A snare is set in the path of the sheep leading to natural soft grounds. When a sheep is snared, the people surrounded it and killed it with bow and arrows. After that is harvested, they cooked only a little for them to eat; the rest was dried and taken back down into the valley to be stored for the cold winter months. They might fish again when they returned from the sheep hunt but only until the time when the caribou would migrate this way. Then, they moved to their cari-

bou fences, set snares in the corrals and somehow would herd the animals into the openings in the fences. This was the best way to get the caribou because it would be too hard to get enough to survive the winter otherwise. When they were lucky, they harvested lots of animals and everyone would share the meat equally, storing most of it for future survival. This food would last until the middle of winter and when it began to run out, they moved to another location to hunt for food again. This is what we call the nomadic life and this is where we come from.

12. The animal would be butchered where it was killed so that the kill site would be left clean. If you bring back an unbutchered caribou, it leaves lots of blood on the snow. To keep the meat clean while butchering, some brush or willows should be cut and laid under the animal. The meat is skinned, cut into parts, the guts and intestines are treated. The intestines are stored in the stomach and then covered with the skin and stored. The guts is a big food meat along with the intestines and layer of fat around the stomach. If you get hungry and fry it, you won't get hungry again for a long time. Both the fish and the meat would be smoke dried and stored for the winter months. The women would tan the hides and sell them at Ft. Yukon. Everyone in the village would get a piece of meat.

13. If someone were to waste some part of the animal, the people would call a meeting of authorities. They would ask for the person that left the wasted animal, talk to him and tell him to not do that again. If the person violates the rule again, his gun is taken away. The third time it happens, the person is banned from the village.

14. If a person doesn't check his traps or fishnets, this is waste and must not be allowed. The animal has worked hard to survive and it's not right to leave it stuck in a trap. We don't know how badly that animal might feel. It would also be waste to let a wolverine get an animal that we have trapped.

15. There is no difference in wasting a big animal like a caribou or a small animal like a squirrel. Each one gives us nourishment so the result should be the same if someone wasted either of them. Jim Christian says that the Indian law is to take only what one needs; that there is no difference in killing bugs as killing caribou when it's not needed as some other animal might need those things.

16. In the early days, even though Arctic Village and Venetie were just like one family, we had Chiefs in each village. If you happened to be in Venetie, you would go to meetings there and vice versa. We always helped each other out. Anyway, there was never a time without a Chief. I remember some of the Chiefs—one was Peter who was Chief before I was born. There was Old Robert and Old John. Later, the sons of Old Robert were Chiefs, Ned, Jimmy and Jonas Robert. At Christian Village, when I went there, it was Chief Christian who was my brother-in-law's father. Chief Christian also had a daughter and raised Elijah Henry's son, Abraham Christian and Peter Christian. In Venetie, it was Silas John's father. If a Chief died, there would be a meeting to pick a new one. The people would talk it over for a short while but usually it would be the smartest person who was made Chief.

17. The Chief would make sure that there was enough meat, food, and water for the whole village. Everyone listened to the Chief and would do what he said. There were always meetings and everyone could talk but it was the Chief that made the decisions. In the old days, there was no Council, but there was a First and Second Chief.

18. The first Council in Arctic Village was started in 1936. It was not much later when John Fredson began to push for a reservation. We had many meetings about it, everybody worked hard for it because we knew we needed it to protect our children's future and save the fish and caribou, our food supply. We all agreed on the reservation. We marked houses, caches, cabins, all down the

East Fork and then up Christian River and up Table Mountain with the reservation boundaries. We wanted to get John Frank's gold camp but for some reason, that didn't work.

19. That was also about the time we worked on a road from Venetie to Christian Village at John Fredson's suggestion. The government paid us in flour and sugar to make a road so we cut wood and worked hard but the food ran short and we had to stop about 10 miles before we reached Christian Village.

20. Nowadays, the Chief and the council are elected from those who are always in the village. There are three councils; the Arctic Village Council and the Venetie Village Council take care of the local problems and the Tribal Council takes care of the land. The local problems are things like fighting drugs and minor crimes. If something bad happens, you can call the chief to get the authority to do whatever needs to be done. First we warn people about the penalties, then fine them, and double fine them. As a last resort, they are forced to leave the village.

21. The Tribal Council is the one that stands up for us in lawsuits over the land or in such things as adoptions. They have encouraged people to build on their Native Allotment land to show others that they are using it. As for adoptions, in the old days if the parents died or could not take care of a child, either the grandparents or another family who had plenty of food would take the child. The new family would consider the child its own flesh and blood. It has happened many times in the past.

22. An outsider who marries into a family does not become Gwich'in and cannot be enrolled on the reservation list but the children can be enrolled. Gwich'in means community of people who live in a particular place.

23. A non-member is not allowed to have a business on our land. John Fredson has told us that this will not

work. The non-member brings down our strength and destroys the land. The only way to keep them from doing this is to ban them from doing business altogether. Someone who lives here with us for 5, 10 or 20 years and takes care of things like we do, becomes like us but still cannot do business on the land. A non-member can rent space if he leaves something here but if a non-member operates a business on tribal land, I will claim all his belongings and make them leave.

24. No one can hunt from an airplane. When we hunt, we are limited to a certain area. Beyond that, the animal is safe from our guns and can reproduce. The animal is never safe from the airplane, it will be killed and there will be no animal to reproduce. The herds will decline and our people will have no food.

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF ALASKA

(Title Omitted)

NARRATIVE TESTIMONY OF JESSIE WILLIAMS

1. My name is Jessie Williams; I was born in 1930 at a camp near Ft. Yukon. I was the oldest child. I had one brother who died, and I have two sisters, Clara Gundrum and Sarah John. My father Enoch John was born in 1893 and was from Ft. Yukon. My mother Mary Simon was born around 1908 and was from Arctic Village. Her parents were Sarah and Ezias Simon from the Arctic Village area. They had 17 children but the only one alive today is my mother's sister Jenny Sam who married Moses Sam and lives in Arctic Village today. My family lived in Venetie and that is where I grew up.

2. My mother died in 1940 and my father was nearly blind. My youngest sister Sarah was raised by Johnny and Sarah Frank after our mother died. This was a common practice of our people. If some family had too many children or if the parents died or something like that, then another family might take some of the children and raise them. For instance, Christian Tritt was born a Henry but his parents had too many children; he was raised by Albert and Sarah Tritt in Arctic Village; his brother Abraham Christian was raised by Chief Christian who was well off and didn't have too many children. This was decided by the families. It still happens but not as much as in the old days because people don't have so many children.

3. My sister Clara and I helped our father haul wood which we traded at the store for flour, sugar, rice, and oatmeal which were sent out by the BIA. We also lived

on wild game such as caribou which people brought to us because my father couldn't hunt. My father also worked at the Episcopal church in Venetie as a lay reader from 1921 until 1972; in 1952 Paul Tritt came down from Arctic Village to be deacon of our church and he later became a priest. My father also interpreted for white people who came to Venetie. He died in 1972.

4. I went to the BIA boarding school at Mt. Edgecumbe from about 1949-1955, and then moved back to Venetie. My sister Clara went too and she graduated in 1957. I got married to Albert Williams in 1963. We met in Ft. Yukon which is where we went to buy groceries. He was from Chalkyitsik and after we got married we visited there in the summer, but we never lived there. We lived in Venetie because I had a job there. I was working for the Post Office from 1960 to 1980. I also became the Village Health Aide, too. I retired from the Post Office because I got too busy. But I still work as a Health Aide.

5. My husband died in 1981, and we never had any children. I don't go back to Chalkyitsik because there's nobody to go there for. There is only one brother of my husband's left. I filed for a Native Allotment which is marked as #114 on the allotment map.

6. We go to Arctic Village for the spring carnival and the Gwitch'in Gatherings. I go there to the clinic because of my job as a health aide. I have some relatives there, too. My father was related to Maggie Gilbert and her children Kias Peter, Trimble Gilbert, and Florence Newman are still in Arctic Village. My aunt Jenny Sam, her husband Moses Sam, and some of their children live there, to. They come here to visit, too.

7. Venetie and Arctic Village each have a local village council and a local chief. The village council takes care of village problems, like alcohol problems, and kids causing problems. The council also maintains the generator and runs the clinic and store. I was a member of the village council in Venetie one or two times in the

60's. David Henry was the village chief for many years in Venetie. The council worked to stop alcohol coming into the village and the men would search all baggage coming into the village. The village council would give people fines and make them do community work if they violated the alcohol ban; sometimes the council would issue "blue tickets" to people who violated the alcohol ban and they would be banished from the village for some time.

8. When I was a young girl I remember lots of meetings were held I had to baby sit back when I was 10 or 11 years old when they had these long meetings until 2:00 or 3:00 in the morning to talk about getting the Reservation. I have heard about the Common Council. It took care of the whole land. I don't know much about land claims, but the Common Council had lots of meetings about it. People from Arctic Village and Venetie were on the Common Council.

9. At some point the Common Council began to be called the IRA Council but I don't know when the name changed. It's really all the same thing. It takes care of the land, sets landing fees and things like that. The IRA Council decides who can be a member and who can live on the Reservation. You have to be a member in order to vote in IRA elections.

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF ALASKA

(Title Omitted)

NARRATIVE TESTIMONY OF MAGGIE ROBERTS

1. My name is Maggie Roberts and I live in the Native Village of Venetie. I am the youngest of fourteen children born to Johnny and Sarah Frank; they had ten boys and four girls. There are only four of us still alive, me and three brothers: Nathaniel, Hamel and Dan Frank. We lived mostly in Gold Camp while I was growing up but often we would travel back and forth between Gold Camp and Venetie. Gold Camp was about 35 miles away from Venetie to the west and north going towards Arctic Village. I lived there from the time I was born in 1935 until I got married to Jimmy Roberts in February, 1953. Both my husband and I selected our Native allotments in the Gold Camp area. Mine is marked #97 on the Native Allotment map; Jimmy's is #94. My father had two parcels in the same area which are numbered #81 and #82; my brothers and I inherited his Native allotment parcels when he died.

2. My parents were from the area around Arctic Village; they moved to Gold Camp the year before I was born. When I still lived with my parents we would hunt and trap and fish for food. Often, we would join up with other Venetie or Arctic Village people such as Moses Sam, Daniel Roberts, David Henry, Jonas Roberts, Henry John, Enoch John, and Jessie Williams in order to hunt caribou and/or moose. My family was really the only family that stayed in Gold Camp at that time. It got so the men would have to go out with the dog teams for miles and miles to look for caribou. At the hunting camp, we

would set up tents. We would dry whatever meat we got on racks and then bring it back to the village in a skin boat. Back in the 1950's, transportation was much more difficult. My husband's grandfather had the first nine horsepower motor which everyone liked. Nowadays, everyone has a motor boat.

3. We also shared a fish camp with the others and dried the fish as we did the meat. We would make a cache to store the food for winter. Trapping was a little different. Each family had their own trapline. The men, and sometimes, the women would go out and check the traps. The lines were spread out over quite a distance and the family might have a number of small cabins along the way for overnight stays.

4. I could locate Kahtsik, the fish camp, on the map as well as the Gold Camp and Christian Village. Some of the Arctic Village people still use the fish camp and trap around Christian Village. There is a trail from Gold Camp to Christian Village. I've never used it myself. It's mostly members of Chief Christian's family that trap down there.

5. Even after I got married we travelled back and forth a lot; sometimes, we travelled all the way to Arctic Village. But, mostly, after getting married we stayed in Venetie because of the school. I had ten children and wanted them to go to school. Two of my brothers had gotten to go to school but I was never in Venetie as a child long enough to take advantage of it. I remember my father, John Frank, the Chief of Venetie a long time ago, appointed Hannah Stevens to teach at the school and even paid her out of his own pocket until John Fredson took the school over. John Fredson would strongly encourage families to come to Venetie so the children could attend the school. He was afraid the government would close the school if there weren't enough people coming. He asked my father three times to bring our family to Venetie.

6. There were elections for village chief every year. Some of the people who have been village chief in Venetie in the past are Daniel Roberts, David Henry, Ned Roberts, Abraham Christian, Steven Fredson, Elijah John. The elections would be after the New Year's celebration. That was a time when there would be family and village gatherings and visits, even before the white man came. You could only vote if you lived in the village, were present at the gathering, and were at least 18 years old. Sometimes, my parents would be present to vote, sometimes not. The chief would oversee the council. Together, the chief and the council would help people having problems on the local level. If a family didn't have enough food, the council would make sure those people did not go hungry. Or, they might step in if there was an alcohol problem. I, myself, have been on the village council for many years in the past from 1970-1990.

7. Each village council and Arctic Village and Venetie combine in a single tribal council. It is called the Native Village of Venetie Tribal Government now. The Tribal Government council works to protect the rights and land of both villagers and villages from outsiders. These tribal council members and chiefs are elected for two or three year terms on the Council. A council member can be re-elected. Again, the voting age is 18 and any member can vote. The first time I ever voted, Abraham John was the tribal chief. One of the things the council takes care of is whether outsiders such as the white people coming up from Fort Yukon can hunt on tribal land. A non-member must ask the village chief or the tribal chief for permission to hunt. Even if they get permission to hunt on our land, they cannot hunt alone but must have a member go with them. This is necessary to protect the game and the land and make sure that there is no waste. The outsider can take whatever he/she needs as long as there is no waste. I don't know of any special rules, otherwise, about hunting. That's what the council and the chief is for—to make those kinds of decisions.

8. It would be the tribal council that deals with adoptions. Usually, other village families would be glad to take in children whose parents had died. My family took in Sarah John when her mother died. She was about eight or nine when that happened, about a year older than me. Her two sisters went to live with their father Enoch John's family. Then, when the daughter of Silas John was eleven and lost her mother, she came to live with me.

9. There are nine members on the tribal council. Four are from Arctic Village, four from Venetie and the ninth is the chief. Both the tribal and village councils can act as courts. The village council will hear the local issues. If someone has broken the rules or been drinking or the store is broken into, the village council will make the person do community service or return the items or pay for damages. If there is a problem between a couple, the village council will try to help them talk things over. Just recently, teenagers who have gotten into trouble have been assigned two hours a day to assist some of the elders with their activities of daily living.

10. The tribal council may act as a court if there is trouble with a village chief and both councils may join forces if there is a major problem that needs to be addressed. Enrollment in the tribe is decided by the Tribal Government. You don't lose your membership by moving out but it's hard for a newcomer to qualify. There is only one membership list for both Venetie and Arctic Village so a person can vote in either place when there is an election.

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF ALASKA

(Title Omitted)

NARRATIVE TESTIMONY OF ROBERT FRANK

1. My name is Robert Frank and I was born in a tent on the banks of the Chandalar River between Venetie and Venetie Landing on July 15, 1944. My natural father was Allah Frank who died before I was born. My mother is Annie Frank who is still alive today. She married Nathaniel Frank before I was born. Together they raised me and 12 other brothers and sisters.

2. Allah and Nathaniel Frank were the sons of Johnny and Sarah Frank who originally lived in the Arctic Village area, then moved to Gold Camp which is between Arctic Village and Venetie but further west and outside the borders of the Reservation. My grandfather Johnny Frank claimed his Native Allotment there (his two parcels are marked # 81 and # 82 on the allotment map. Sometimes my grandparents lived at Venetie where my grandfather was the Chief and worked with John Fredson to set up the Reservation and the IRA government for the Neets'ai Gwitch'in people; my mother Annie was the daughter of James and Myra Roberts who lived in the Venetie area. Her sister Julia married Paul Tritt, son of Albert Tritt from Arctic Village. Paul and Julia had a house in Arctic Village but they moved to Venetie many years ago and Paul is the Episcopal lay preacher in Venetie. Another of my mother's sisters was Maggie who married John Erick, Sr. from the Venetie/Kahtsikh area.

3. I was raised in and around Venetie where I attended school through the eighth grade. I learned English at

school. At the age of 18 I went to boarding school at Chemawa, Oregon and graduated from high school two years later, in January, 1964. I went immediately to San Francisco as part of the BIA relocation program and spent about one year there. After that I joined the National Guard and did my basic training at Fort Ord, California. I returned to Venetie in approximately 1966, and pretty much stayed there until 1982 when my wife and I moved to Fairbanks because of medical care that I needed and because my wife wanted to attend college. I return to Venetie five or six times a year to visit, take part in hunting, fishing and community activities, and to participate in Tribal government meetings.

4. I married Bertha Eric in 1968. Bertha is the daughter of Natalie and Paul Eric; she was raised in Fort Yukon and at Katsikh, the fish camp where the Eric family spent many months of the year. As far as I know, Bertha's mother Natalie is from Circle; her father Paul is a tribal member from Venetie/Katsikh. Bertha's brother is John Erick, Sr. who changed the spelling of the family name by adding a "k" at the end. That is why John's children Ernest, Vera, Sherry, Richard, Robert and Virginia all spell their last names "Erick."

5. Although I was mostly raised in Venetie, my family traveled in the summer down the Chandalar River to Martin Creek where we caught and dried white fish; in September we would return to Martin Creek to catch and freeze more fish. All of the fish would be stored in a cache built up off the ground. Later, during the winter, the fish would be hauled back to Venetie by dog sled for our winter food supply. There were two fish camps close together, about a one day's walk from Venetie. Most of the families would go down together for the summer fishing. When I was a boy and before we had boats with motors, we would usually walk to fish camp; some of us boys would actually swim down the river a good part of the

way. We would also all go out to Big Lake near Venetie for spring duck hunting; sometimes the people from Artic Village would come down and go duck hunting, too. Dog salmon also come up the Chandalar as far as Venetie but they aren't much good for food; people catch them and dry them for dog food, but that's about it.

6. We also spent time at Gold Camp where my grandparents had built cabins; we stayed there for moose hunting in the fall. We would make a skin boat at the end of the hunting season to float the meat down the Chandalar back to Venetie. Caribou used to come by Venetie but in my lifetime they have changed the trails they follow so people in Venetie now have to go up to Arctic Village to hunt caribou. When the caribou come around, there is a group meeting where it is decided which groups will go where and who will hunt for the old people. I remember my first time going to hunting camp. I was about 10 years old and Moses Sam was the hunt leader. He was in charge of dividing up the meat and making sure everyone got some. He decided when to stop the hunt after everyone had enough meat.

7. In Venetie we lived in log cabins; we lived in tents at fish camp and often when hunting. Some people built small cabins out on their traplines. I used to trap between Gold Camp and Venetie and also down towards Martin Creek. I would always leave my traps out on the trapline so that the smell of humans would not contaminate them. No one would bother anybody else's traps; everybody knows your area and respects it. Even after I moved to Fairbanks, I returned for one trapping season with my nephew Lawrence Roberts. We had a good season trapping for lynx during the 1987-88 season. I haven't gone trapping since then.

8. When I was a child there was only about one flight a week to Arctic Village. My step-brother Stanley Frank and I flew up to Arctic Village when I was about

14 years old. It was my first trip there but I knew a lot of people who had visited in Venetie; I also recognized a lot of people from pictures my family had shown me of various relatives who lived in Arctic Village. We were treated just like part of the family by the people in Arctic Village; they fed us and seemed very happy to see us. From Arctic Village, Stanley and I walked down to Gold Camp, about a 3-day walk, and then back to Venetie. I also lived in Arctic Village for one year in 1978 when I was working on an elders grant project; I helped out with paperwork and helped start a summer youth program. My relatives in Arctic Village include the James Gilbert family who are related to Johnny and Sarah Frank; I'm also related to Alice Peter.

9. I filed for my Native Allotment on the Chandalar River below Venetie near my parents' Allotments. Mine is marked # 84 on the map; my mother Annie Frank's is # 76; my step-father Nathaniel Frank's is # 83. My brothers Amos and Clifton Frank also selected their Allotments in that area. Amos' is # 75 and Clifton's is # 79. My wife Bertha filed for her Native Allotment down in the vicinity of Fish Camp/Kahtsikh. It is marked # 69.

10. Venetie and Arctic Village have village councils that take care of local matters while the Native Village of Venetie Tribal Government is the governing body for the entire reservation. As far as I know, this has been the situation since the early 1960's. I remember when I was about 18 years old, just before I went away to school at Chemawa, there was a big meeting in Arctic Village where leaders from both villages met with BIA people to talk about how the IRA government would continue to protect the land and govern all the people on the Reservation. As far as I can remember, this is the time when it was decided to keep the local village council in Arctic Village and for Venetie to have a local village council, too, and to continue having the IRA council govern and protect the whole reservation. The idea was to have members from each village elected to a common council so Arctic Village

wouldn't feel that they had no say in the government of the reservation.

11. In 1967 or 1968 I was elected chief of both the Venetie village council and the IRA government. At that time the IRA government was usually called the "Native Village of Venetie." Now it is usually called "Native Village of Venetie Tribal Government" or just "Tribal Government." I pretty much stayed on the village and tribal councils all those years until I moved to Fairbanks in 1982. Even after that, I have been elected to the Tribal Government Council several different times while I was living in Fairbanks and have traveled back to Venetie for Arctic Village for Council meetings at least once or twice a year.

12. Two of the most important things ever done while I was involved with the Tribal Government in the 1960's and 1970's were the protecting of tribal ownership of the land and enforcing the ban on alcohol consumption and importation throughout the reservation.

13. We began actively working on banning all alcohol in the 1960's after many incidents of violence and other problems caused by people bringing alcohol to our villages. In Venetie we had meetings of all the people that went on for many hours. We selected Christian Tritt as our tribal judge. Anyone that the Council believed had violated the alcohol ban would have to go before Christian Tritt, whose job it was to pass sentence on the person--how much of a fine to pay or how much community service the person had to do. When I was Chief I never did like to use the "blue ticket," which causes a person to be banished from the reservation for a certain period of time. It was my belief that we needed all the tribal members right there on the reservation, but others after my time have used "blue tickets" and banished people who violate the alcohol ban. It is my belief that the reason we are successful in getting rid of alcohol on the reservation is that we had

many, many meetings and talked a long time among ourselves. The rule to ban all alcohol was decided by all the people and they supported the Tribal Council and the local village councils in enforcing the ban. When I was Chief I also talked to the FAA and pilots and people who owned the planes coming into Venetie and Arctic Village and tried to educate them about not bringing in alcohol. One of the jobs of tribal and village council members was to search all baggage of incoming planes. Any alcohol found was destroyed or sent back to Fort Yukon. The ban is still strictly enforced to this day.

14. The other major issue we had to deal with was the land claims settlement. We had many meetings in both villages educating ourselves about the settlement and what options we had. I traveled a lot in those days, even to Fort Yukon and Katsikh, trying to reach all of our members to let them know that we had to decide about keeping our reservation land or choosing a smaller amount of land and getting some of the money from the land claims settlement. Some of the things people talked about at these meetings was how hard our ancestors had worked to get the land in the first place and to protect it from outsiders and how we had to keep protecting it for the future generations. It was no surprise to me that the vote was overwhelming in favor of keeping all of our reservation land instead of becoming Doyon shareholders and getting a part of the settlement money.

15. Because of ANCSA, two corporations were formed, one for each village on the reservation. People had to sign up to be enrolled to either Venetie or Arctic Village; those enrollees are the people who voted on keeping the reservation lands or joining the Doyon region corporation. We never did like those state-chartered corporations so we made up our minds to transfer our land to our tribal government. Finally, in 1976, we passed resolutions and sent notices to state and federal agencies and to Tanana Chiefs Conference about the fact that our IRA tribal government was going to be called Native Village of Venetie Tribal Government and that it governed over all the reservation lands.

16. I went to Anchorage in December of 1979 for the signing of the patent from the federal government jointly to the Venetie Indian Corporation and the Neets'aii Corporation of Arctic Village. It was the largest single tract of land ever conveyed by the federal government to private owners; the Anchorage Daily News ran my picture with a story that said we got title to an area larger than the state of Delaware. The corporations deeded all that land to our Tribal Government and then we just stopped operating the corporations. This was all right with all the tribal members because having corporations to run just made more jobs for the same few people. For instance, I was a corporation officer as well as a village and Tribal Council member. It could get very confusing which hat a person was wearing with all those organizations. It was just much better for us to stick with our tribal and village council system of government.

17. When I was the IRA Tribal Government Chief I also had to deal with matters involving children of our members. I remember one time a state social worker went up to Arctic Village because someone had filed a complaint. I told the state not to come into our villages unless they heard from the Tribal Government first. After that we never had any problems. In those days adoptions were done the "old way"—that is, by agreement between families or between family members. That has always been how we take care of our children.

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF ALASKA

(Title Omitted)

TESTIMONY OF SHIRLEY LEE

1. My name is Shirley Lee and I am currently employed by the Tanana Chiefs Conference (TCC) as director of the Community and Natural Resources Department and as director of the Village Government Services.

2. Education: I am a certified paralegal, having completed a two-year Indian Law program offered by the Antioch School of Law. My training was obtained from 1979-80 at the Washington D.C. law school.

3. In February 1988 I was hired by the Fairbanks Agency Office of the Bureau of Indian Affairs as Tribal Operations Specialist, overseeing that program. I worked under the supervision of Mike Stancampiano who was then superintendent of the Fairbanks agency. At that time the Fairbanks Agency tribal operations program provided training and technical assistance in all aspects of tribal operations to twelve tribes, including the Venetie IRA council and the village councils of Venetie and Arctic Village. Services included constitution drafting, ordinance drafting, enrollment and administrative functions.

4. The Fairbanks agency office dealt with three government entities on a government to government basis. Venetie and Arctic Village are governed by local village councils, while the land base (the former Chandalar reserve), entire membership and non-members within the land base are governed by an Indian Reorganization Act tribal government known as the "Native Village of Venetie Tribal

Government" (NVVTG). The village councils are recognized as governmental subdivisions of the NVVTG and as such are eligible for direct services from the BIA.

As director of tribal operations, I oversaw the delivery of tribal operations services. Specific tribal operations services provided to the NVVTG included a tribal enrollment project. I assisted the council in drafting a tribal enrollment ordinance, which was used to interpret tribal membership requirements contained in the Venetie IRA constitution. The ordinance was adopted by the tribal membership after a series of educational meetings. I also assisted in the formation and utilization of an enrollment committee, whose job it was to collect and review tribal enrollment applications and to make recommendations to the council on approval or disapproval of each application. Committee members were appointed by the council through resolution. The committee was quite active during my employment at BIA and processed many applications from both the Venetie and Arctic Village Gwitch'ins who comprise the Venetie IRA tribal membership.

4. NVVTG worked with the BIA to create a tribal enrollment list, which is a living document continually being updated. The purpose of the enrollment project was to formalize the enrollment to provide easier identification of the NVVTG tribal membership. This was prompted in part by the Indian Health Services adoption of proposed amendments to their eligibility criteria, which would require eligible service recipients to be enrolled tribal members and not merely of Native ancestry. The IHS tribal enrollment criteria were placed in moratorium and have not yet been implemented.

5. Qualifications for enrollment are enumerated in the IRA Constitution and clarified in the enrollment ordinance. The ordinance also sets forth the enrollment process. Applicants for tribal enrollment submit applications and supporting documentation in the form of birth

certificates and/or paternity affidavits to verify their lineage. Applications are then reviewed by an enrollment committee to insure accurate documentation is provided and to make a approval or disapproval recommendation to the NVVTG council.

6. During my employment at BIA I travelled to Venetie and Arctic Village on a regular basis to work with the Venetie IRA Council and the two village councils to provide programmatic services.

7. In June 1991 I was offered the job of Director of Village Government Services for the Tanana Chiefs Conference, Inc. (TCC). TCC is a nonprofit tribal consortium that provides services to its forty-three (43) member tribes. TCC currently employs some 600 staff to carry out this function.

8. TCC's primary role is to deliver programmatic services. TCC contracts primarily with the Bureau of Indian Affairs and the Indian Health Service, but delivers some programs contracted from the state and other sources. Service delivery is facilitated by six TCC subregional offices which are: (Fairbanks) Yukon-Tanana Subregion; (Fort Yukon) Yukon-Flats Subregion; (Galena) Yukon-Koyukuk Subregion; (Tok) Upper-Tanana Subregion; (McGrath) Kuskokwim Subregion; (Holy Cross) Lower-Yukon Subregion. Venetie and Arctic Village fall within the Yukon-Flats Subregion. Coordination of service delivery is handled out of the TCC Central Office in Fairbanks.

9. Only federally recognized tribal governments are allowed to contract under P.L. 93-638 for direct services. Since TCC is not a tribal government, it must receive authorization from the tribal councils within its region to contract in their behalf. Currently, TCC receives specific authorization from the tribal councils for each project that it contracts and manages.

10. TCC had a 1992 budget of $29.9 million dollars. A breakdown of funding sources is as follows: $18,458,000 from P.L. 93-638 (Indian Self Determination Act) contracting with the Alaska Area Indian Health Service; $3,520,000 from P.L. 93-638 contracting with the Bureau of Indian Affiairs; $4,165,000 from miscellaneous federal grants; and $3,836,000 from miscellaneous state grants.

11. The service programs that TCC operates include the following:

Health Care funded by AANHS contracts:

Health Administration—Includes Department Management, Chief Andrew Isaac Health Clinic Administration, SR Offices, and Business Office

Direct Clinical Care—Includes Medical, Nursing, Pharmacy, Dental Subregional Clinic, Records and Eye Clinic

Contract Health—Includes Hospital, Specialty Medical, and Patient Travel

Community Health—Includes Health/Safety Education, Outreach Workers, Environmental Health, Hostel, Nutrition

Mental Health—Includes Mental Health, Alcohol/Drug, and Tok Area Alcohol

Health Aides—Includes Health Aide Services, Training, and EMS training

Tribal Resources funded by BIA contracting:

Natural Resources—Includes Forestry, Wildlife & Parks, Agricultural & ANA Agr. Extension

Realty/Lands—Realty, ANILCA Realty

Village Government—Credit & Finance, Government Services, Tribal Operations

Other Client Services funded by miscellaneous federal and state grants:

Housing/Utilities—Includes Energy Assistance, Homeless/Emergency, M. H. Housing, Weatherization

Training/Education—Includes Aids Prevention, Domestic Violence, Recovery Camps, Alcohol/Drug, Mental Health, Health Aide Training, Nutrition Counseling, Prematernal Counseling

Children/Youth—Includes Head Start, JOM Education, Youth Treatment, Child Care Services, WIC Nutrition, Village 4-H, Infant Learning

Public Safety—Includes VPSO

Miscellaneous programs—Includes Disabled Case Management, Elderly Nutrition, Community Development, Economic Development, Fish/Wildlife Co-op, BIA Self-Governance, Indian Child Welfare, Remote Maintenance, McGrath Health Center, Developmental Disabled, Alzhiemer Respite.

12. TCC has been authorized to contract on the tribes' behalf for health services, but has retained the authority to contract directly with the BIA for other services. To determine the share of ANHS funds available for Native health care in Venetie and Arctic Village, a population share formula is generally used. For example, based on the 1990 census, Arctic Village had a population of 90 Alaska Natives and Venetie had a population of 261 Alaska Natives. The total population for the two communities is 261, which represents 2.5 percent of the total Alaska Native population that TCC serves. FY 1992 IHS recurring funding for the TCC area was approximately $14,765,000 in the contract and $1,000,000 for Indian Health Service personnel assigned to TCC, for a total of $15,765,000. Arctic Village/Venetie share of this amount would be approximately $395,000 per year.

Currently, TCC allocates more than this amount of funds for services to the residents of these communities. This is due to the weighted allocation of TCC funding in favor of village beneficiaries over Fairbanks beneficiaries to adjust for the access to care differential. The following is a cost allocation for Venetie and Arctic Village based on FY 1992:

	SERVICES	ALLOCATION
A.	Community Health Aids Services	$125,000
	Two primary CHAs in each community Health Aide Supervision from Fort Yukon Health Aide Training: Fairbanks	
B.	Yukon Flats Health Center in Fort Yukon	$ 75,000
	Daily Health Aide Consultation Medical Evacuations Physician assistant services Community Health Representative services Dental services in Fort Yukon and itinerant visits to Venetie/Arctic	
C.	Services at TCC CARE CENTER in Fort Yukon	$ 10,000
	Mental Health/Alcohol Counseling counselor visit to Arctic Village/Venetie	
D.	Village School and community Health & Safety	$ 5,000
	Education Services (HIV/AIDS, FAS/FAE, Youth, Tobacco Cessation, Injury Prevention)	
E.	Services of Chief Andrew Isaac Health Center	$ 60,000
	Physician/PA/Nursing/PHN services Pharmacy Services Mental Health/Alcohol/Nutrition Counseling Maternal/Child	

F.	Contract Health Services estimated at $500 per resident, includes: inpatient hospital care specialty medical care outpatient surgery services patient transportation services	$135,000
G.	TCC Dental Clinic in Fort Yukon	$ 5,000
H.	TCC Eye Clinic in Fairbanks/Fort Yukon	$ 2,000
I.	Patient Hostel in Fairbanks	$ 3,000
J.	Environmental Health Services from Fairbanks Annual clinic/water/sanitation surveys Annual community env. health profile Annual rabies vaccination clinics Assistance with project engineering	$ 5,000
K.	Health Services administration including personnel, payroll, purchasing, travel, accounting, board meetings, audit	$ 20,000
	TOTAL TCC RESOURCES ALLOCATION	$445,000

13. Venetie and Arctic Village are also beneficiaries of other service programs run by TCC, funded by state or federal grants.

14. The Women's Infants and Children's Supplementary Food Program (WIC) is operated by the TCC nutrition program. The program is funded by a grant from the Alaska Department of Health and Social Services, Division of Public Health, Section of Maternal Child Health and Family Services. This section is awarded a Federal Grant from the U.S. Department of Agriculture Food and Nutrition Services on a yearly basis. This money is then awarded to grantees around the state. Arctic/Venetie have an average of 12-15 clients who participate in the WIC program. The estimated administrative cost for each village is $1450 for one year of services.

15. In Fiscal Year 1994 TCC will be participating in a Self-Governance Demonstration Project, converting the majority of their Bureau of Indian Affairs programs contracted under P.L. 93-638 to a compact obtained pursuant to P.L. 100-472. The compact is intended as an experiment in the areas of planning, funding and program operations within the Government-to-Government relationship between Indian tribes and the United States. The NVVTG and the traditional councils of the Venetie and Arctic Village have elected not to participate in the compact and will continue to receive direct service delivery for BIA programs from the Fairbanks Agency.

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF ALASKA

(Title Omitted)

NARRATIVE TESTIMONY OF WILL MAYO

1. My name is Will Mayo and I have been the President of the Tanana Chiefs Conference for the past two and ½ years. Before that I was the Director of the Village Government Services at TCC. I am an Athabaskan Indian and grew up in Fairbanks, Alaska. Most of my family is originally from Tanana. I spent some of the time while I was growing up in Tanana and lived there for several years after I attended college in Seattle. I was in Tanana from 1976 until 1984 when I moved to Fairbanks and began to work for Tanana Chiefs conference.

2. TCC's primary role is to deliver programmatic services. TCC contracts primarily with the Bureau of Indian Affairs and the Indian Health Service, but delivers some programs contracted from the state and other sources. Service delivery is facilitated by six TCC subregional offices which are: (Fairbanks) Yukon-Tanana Subregion; (Fort Yukon) Yukon-Flats Subregion; (Galena) Yukon-Koyukuk Subregion; (Tok) Upper-Tanana Subregion; (McGrath) Kuskokwim Subregion; (Holy Cross) Lower-Yukon Subregion. Venetie and Arctic Village fall within the Yukon-Flats Subregion. Coordination of service delivery is handled out of the TCC Central Office in Fairbanks.

3. Only federally recognized tribal governments are allowed to contract under P.L. 93-638 for direct services. Since TCC is not a tribal government, it must receive authorization from the tribal councils within its region in

order to contract in their behalf. In the past TCC received general resolutions from tribal councils authorizing TCC to contract on behalf of tribes. Currently, TCC receives specific authorization from the tribal councils for each project that it contracts and manages.

4. TCC had a 1992 budget of $29.9 million dollars. A breakdown of funding sources is as follows: $18,458,000 from P.L. 93-638 (Indian Self Determination Act) contracting with the Alaska Area Indian Health Service; $3,520,000 from P.L. 93-638 contracting with the Bureau of Indian Affairs; $4,165,000 from miscellaneous federal grants; and $3,836,000 from miscellaneous state grants.

5. I have traveled to both Venetie and Arctic Village to meet with the local village councils and tribal members. In the course of working with the village councils I learned of the existence of the Native village of Venetie Tribal Government, which is the umbrella Indian Reorganization Act Government for the two villages. It is my understanding that that IRA Government exercises authority over the entire land base and tribal membership.

6. The former Chandalar Reservation is owned by the IRA Government which exercises governmental authority over the area. This includes the authority to determine who may come and remain on tribal lands as well as the authority to determine the rules of conduct while anyone—member or non-member—is present on tribal lands. The local village councils, however, administer law and order on a day to day basis. It is clear to me, and recognized by TCC's member tribes, that the Neets'aii Gwich'in of Venetie and Arctic Village constitute a unified tribe that exercises exclusive control over its territory within the former Chandalar Reservation.

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF ALASKA

(Title Omitted)

NARRATIVE TESTIMONY OF PIERRE DEMERS

1. My name is Pierre Demers. My wife Meggie and I are Wycliffe Bible translators. Since 1979 we have been working on a Gwich'in Translation of the New Testament of the Bible. We lived in Venetie from 1979 until 1986 when we moved with our three children to Healy, Alaska. I return to Venetie for about one week of every month; occasionally I go to Arctic Village as well. We anticipate it could take up to 10 more years to complete our Bible translation project.

2. Both my wife and I have bachelor of science degrees in Biblical studies from Bethany Bible College, although some of our undergraduate work was also done at the University of California at Santa Cruz. We then did post-graduate work through the Wycliffe Summer Institute of Linguistics at the University of Arlington in Texas and the University of Oklahoma at Norman, Oklahoma. We completed six months of field training in Southern Mexico and then came to Alaska as Wycliffe Bible translators. We chose the Gwich'in Bible translation project from among several possible alternatives.

3. Upon our arrival in Alaska, I traveled to Venetie with Dick Mueller, the Wycliffe translator who had been working on the Gwich'in New Testament for many years himself. He introduced me to the Venetie Village Council, we explained the project, and requested permission for me and my family to live in Venetie to learn the language and culture of the people. Later we were informed

that the Council had approved the request and asked for help in finding us housing. Steven Fredson came forward and offered us a reduced rental rate for the small log cabin next door to his frame house. We lived there for the remainder of our time in Venetie. We already had one two-year old child when we arrived in Venetie and two more children were born during the years we lived there.

4. For the first two years, we immersed ourselves in the daily life of the Village, learning the language and as much about the culture as possible. I went hunting, fishing or out on traplines just to observe and learn. Our first translation project, a Bible story told in comic book style, was done at the request of the elders in the Episcopal church to be used in Sunday school lessons for the children of Venetie and Arctic Village. Then we were asked to translate favorite English hymns into Gwich'in. We also began to work on revisions of some of Dick Mueller's earlier work and some original translations of parts of the New Testament.

5. We work with Native Gwich'in speakers such as Judy Erick, Mary Rose Roberts, Caroline Tritt Frank, who donate their time and receive no pay; after a draft of a text is prepared, larger groups of people in each Village review the text and give suggestions for changes and clarifications. For at least the past two years, the Episcopal Church in each Village has been able to include at least one text in Gwich'in in each of their services.

6. Even though we were given official permission to live in the Village by the Village Council, it took about five years of living there before we were really accepted by community members. The Council gave us permission to get fire wood and to go hunting and fishing but we could not vote in local elections. Because of how long we lived there the Council did not require a local resident to accompany me every time I went out hunting and fishing, although this rule was applied to all other "out-

siders" who came to the Village. For instance, the school teachers were not given the same privileges we enjoyed. Jessie Williams, the Village health aide gave our children Indian names.

7. Many of our friends have been Village or Tribal Council members or chiefs. From these contacts and our general knowledge of the two communities I learned about the governmental structure which includes two local Village councils and a tribal council overseeing both Villages and generally dealing with outside agencies. For instance, when we arrived, the Tribal Council was involved in negotiations for some oil and mineral exploration on tribal lands.

8. The Village Council in Venetie took care of local problems much like a city council does. For instance, on two separate occasions while we were away from Venetie, our home was broken into and some items stolen. The Village Council found out which youths were responsible, saw to it that the missing items were returned, and determined whatever discipline would be imposed on the youths. Most of my dealings were with the Venetie Village Council.

9. The people of Arctic Village and Venetie definitely see themselves as a distinct group of Gwich'in Athabascans. They consider themselves to be the "mountain or Neets'ai people and Caribou or meat eaters. The people of Fort Yukon are considered people of the flat country and fish eaters. There are considerable language or dialect differences, mainly at the word level, between the Gwich'in spoken at Fort Yukon and that spoken at Arctic Village/ Venetie—this requires a careful search for "compromise" wording in our Bible Translations because we simply cannot write entirely separate translations for Arctic/Venetie and for Fort Yukon. If we didn't work on finding words common to all Gwich'in Village we would end up with Fort Yukon people not understanding and rejecting terms used by Arctic Village people and vice versa.

10. Despite these language and cultural differences, the Gwich'in people feel a sense of relatedness. From talking to elders such as Grandma Sarah Frank, I learned that long before contact with outsiders, the various Gwich'in bands would gather on a regular basis, often when the rivers would open up and travel was easier and food more plentiful. It was customary for the chiefs of the various bands to dip net salmon from canoes in displays of skill and dexterity; and that even the chiefs from a far away as Arctic Village would come down to the Yukon River for such gatherings. It was this historical tradition of the gathering of the Gwich'in bands which was revitalized with the June 1988 Gwich'in gathering in Arctic Village. People from all the Gwich'in Villages in Alaska and from as far away as Old Crow and Ft. MacPherson in Canada came to the gathering and continue to attend the subsequent gatherings which have been held, one in Venetie and another in Arctic Village, I believe.

11. It is my observation that Gwich'in from Fort Yukon or other neighboring Villages are more easily accepted into the communities of Arctic Village and Venetie than are outsiders such as myself or non-Gwich'in Native Americans.

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF ALASKA

(Title Omitted)

NARRATIVE TESTIMONY OF GIDEON JAMES

1. My name is Gideon James and I reside in Arctic Village, Alaska. I have lived there for most of my life. I was born in 1939. My parents were Ezias James of Birch Creek and Martha Tritt of Arctic Village. My father's parents were Birch Creek James and Agnes James and my mother's parents were Albert and Sarah Tritt. I had three brothers and five sisters, but two of my brothers and two of my sisters died.

2. My earliest years were spent in Fort Yukon, but we spent most of the years while I was growing up in the Sheenjik River area and around Arctic Village. The men would travel by boat from Fort Yukon to bring supplies to our camp and the women and children would walk to Sheenjik from Arctic Village. The trapping in the Sheenjik area is very good in the winter.

3. After spending the winter in the Sheenjik area we would walk back to Arctic Village during the spring to spend the summer and take caribou as they came through the area. At places within and outside the reservation we would set up muskrat trappings camps. Families would usually have the use of three or four lakes to use for trapping. We would also hunt and dry caribou and catch whitefish. Caribou cows and calves would usually be in our areas in July while the bulls would come through in late fall. The caribou seem to be more scattered now because of more human disturbances. We would also hunt moose in July and August and dry the meat. Sheep

are treated as a delicacy and receive special treatment. They are usually taken in early fall and saved for special occasions throughout the winter.

4. There were about nine cabins at the Sheenjik area. They belonged to Gilbert Joseph, Alice Peter, James Gilbert, David Francis, Steven Peter, Isaac, Albert and George Tritt and Ezias James.

5. This pattern of moving back and forth between Arctic Village and Sheenjik continued until about 1951. In that year our family went to Fort Yukon so we children could go to school. My mother thought there were too many bad influences in Fort Yukon so in about 1953 or 1954 we moved back to the sheenjik area and in about 1955 we went back to Arctic Village.

6. I filed for my Native allotment in the Sheenjik area. It is marked #14 on the Native allotment map, which is Exhibit #209. My sister Sarah James also has a Native allotment in this area. Hers is marked as #18 on that same map. My father Ezias James has a Native allotment at Old John Lake and my mother Martha James has hers on the Junjik River north of Arctic village, marked #17 on the Native allotment map; my brother Albert and sisters Lillian and Dorothy all have allotments near my mother's, marked #s 11, 16, and 20 respectively.

7. In 1956 there was a volunteer school teacher in Arctic Village, where we now stayed permanently. The teacher, Yolanda Rocker, recommended that the children be sent to Mt. Edgecumbe for schooling. I went there with my sister Lillian and graduated in 1961.

8. After graduation I went into the Army for three years; first in Texas and then in Florida during the Cuban missile crisis. I then went to a trade school in Chicago to study gas and diesel mechanics during 1964 and 1965. I worked at some apprenticeships for a few years in Chicago and San Francisco.

9. In 1970 my father died and all the children who were living outside of Alaska came home to Arctic Village. I have lived in Arctic Village ever since.

10. My permanent home is in Arctic Village, but I spend large amounts of time camping on my trapline in the winter months and out hunting. Many of the areas I use, such as Sheenjik, are located outside of the tribally owned reservation. Other tribal members who live in Arctic Village use areas within and outside the tribally owned lands. Our customs and traditional use patterns are known to all who live in the Village. There has never been a need to write these things down. Children are taught these things as they grow up.

11. Tribal members from Venetie often come up to Arctic Village to hunt, fish and visit. They borrow equipment if they need to for hunting or fishing and always leave something behind if they are successful. They are all aware of what is considered proper behavior and don't interfere with the existing rights of other members.

12. I was elected to the Arctic Village Council in 1971. Christian Tritt, who was the council chief, asked me to work on the land claims and to help explain what the options were. There was a lot of confusion in those days about how the land claims were going to be settled. I took the time to study the issues and visited with others from outside the reservation to discuss these things. I was at the Alaska Federation of Natives Convention in 1971 when President Nixon came over the loudspeaker to announce that he had signed the land claims bill.

13. After the land claims bill passed I took courses in map reading and about the land claims at the University of Alaska-Fairbanks in 1972. I travelled to Venetie and out to the traplines to give information to our members about the vote that was to take place in 1973. The vote was about whether to keep our reservation land, or to be

a part of the ANCSA corporate settlement. It was at this time that I began to get more involved with the IRA government in order to make sure that the tribe would get to keep the land. Robert Frank was the First Chief of the IRA government at that time.

13. The election on whether to keep the reservation land took place in 1973 and the vote was nearly unanimous in favor of keeping the land.

14. In the mid-1970s we gave all outsiders notice of the participation of both villages in the IRA government, which is known as the Native Village of Venetie Tribal Government. That notice is exhibit 82.

16. I helped organize a trip to Anchorage by the Boards of Directors of the Neets'aii Corporation and the Venetie Indian Corporation to meet the representatives of the Bureau of Land Management and the Regional Solicitor. Those two corporations were created as provided by ANCSA and jointly received the land that made up the Chandalar Reservation. The federal officials all said we were free to deed the land from the ANCSA Corporations back to the Tribal Government.

17. I have been on the Tribal Government council for about seventeen years and have been First Chief four different times for a total of about twelve years. I have also been a member of the Arctic Village Council several times. I am a member of the Arctic Village Council and Tribal Government Council now.

18. In addition to the Native Village of Venetie Tribal Government, which is also called the IRA Government, each village has a local council that handles village business. These village councils also enforce laws and rules adopted by the Tribal Government. For example, the Tribal Government sets landing fees for the village airports, but the local village councils collect the funds. The Tribal Government sets policies on land use and the relations with State and Federal government agencies re-

lated to lands. The Village Councils help carry these policies out. Money from landing fees is used for airport maintenance and land use fees are usually kept by the Tribal Government for administrative purposes. Land is very important to our tribe and no quick decisions are ever made about it. Last summer the Tribal Government interviewed contractors who wanted to get hired to improve some of our culvert system in Arctic Village. Because their presence and activity would affect the tribal members and the land, we made sure that they protected the environment and observed tribal rules respecting the ban on drug and alcohol use. They were also not allowed to hunt game. They were encouraged to follow our tribal member employment preference. In exchange for gravel needed for the project, we bartered for equipment used to conduct the repairs. In about 1984 the Native Village of Venetie Tribal Government also received a direct contract from the FAA to build a new airport at Arctic Village.

19. As First Chief of the Tribal Government I often participate in child custody cases that the State is involved in. These kind of matters are dealt with through meetings with the local council chiefs and the family members of the people involved with the cases. The Tribal Government deals with all matters affecting the land or the membership as a whole. Any actions that affect our children are considered very important and the Tribal Government gets involved.

20. The Village Councils take care of local matters, but the Tribal Government sometimes has to step in to back them up. Last year I had to go to Venetie to speak to the school children about how they should behave and respect the land. This was because the Village Council was having a hard time getting the children to behave. The same is true with the liquor ordinance. The Tribal Government prohibits it on all reservation lands, but the Village Councils enforce it. If the Village Councils

are having trouble with someone not following their orders, the Tribal Government will be asked to help.

21. There has never been a need to write our laws down or to write up descriptions of how we operate. But recently, more and more State government and federal government programs are causing us to do things more formally. We received a grant from the Administration for Native Americans (ANA) self-governance project in the amount of $158,000 to interview our elders and write down traditional knowledge, customs and advice about how to preserve our land and tribe. We also plan to write down our traditional laws as part of our ANA project. The goal is to ensure future protection for our tribe and its membership and to make sure that our tribal government remains in control of all local matters. We also have been awarded a $90,000 BIA technical assistance grant to pursue housing programs and obtain Tribal control over other services now provided by the Indian Health Service and other entities.

22. There are about 150 people living in Arctic Village, only about 4 or five of whom are non-Natives. There is an ANICA store and a privately owned store. Both carry some frozen meat, canned goods, and a small amount of food staples such as rice. Arctic Village has a community hall, a tribal office building for both the Tribal Government and village council, a washeteria, community freezer unit, and a post office. Electricity is provided by a generator. Gas costs about $4.00 per gallon and fuel oil is about $2.70 per gallon. Wood stoves are used for heating almost all buildings. There is no running water in the village except for the school and washeteria.

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF ALASKA

(Title Omitted)

NARRATIVE TESTIMONY OF SARAH JAMES

1. My name is Sarah James; I was born in 1944 in Fort Yukon, although my family lived primarily at Salmon Village on the Sheenjek River at the time I was born. This location is outside the Reservation boundary southeast of Arctic Village. During my childhood we also lived for periods of time in Fort Yukon and Arctic Village.

2. My father was Ezias James, originally from Birch Creek. He married Martha Tritt, daughter of Albert and Sarah Tritt of Arctic Village, and together they raised me and my brothers and sisters mostly in the Arctic Village and Salmon Village areas. My grandfather (my mother's father) was Albert Tritt, who started the church and a school in Arctic Village. My mother wanted to stay near where she grew up and make sure the Village kept going. She always told us that the land and our way of life was very important to her. Her parents arranged for her marriage to Ezias James; arranged marriages were the custom to avoid marriage to relatives that were too closely related. Parents' decisions in these matters were respected by their children.

3. During my growing up years, our family lived off the land hunting, fishing, trapping, gathering, and making whatever we needed. My mother sewed all of our clothes and my parents made snowshoes and toboggans. We lived in Fort Yukon for 3 years in the early 1950's where there was a school but some of the kids began to get in trouble

and my parents moved our family back to Salmon Village, also known as Sheenjek Village. There had been a whole village there in the 1930's and 1940's with about nine houses; these have gradually been eroded away by the river and gradually people moved to where there were schools. We were the last family to stop living at Salmon Village. I filed for my Native Allotment on the edge of a lake in the old Salmon Village area. It is marked #18 on the allotment map. My brother Gideon also has his Native Allotment in that area; it is marked #14.

4. We moved to Arctic Village in 1955 because they needed more students to start a permanent school in Arctic Village. That is also the year my grandfather Albert Tritt died. Before he died, I went fishing with him and helped him cut wood. This a custom of our people—younger persons like me would go out with grandpas and other elders to help them and also to learn. After my grandfather died, I spent more time with my grandmother and helped her. It was customary for children to be sent to live with their grandparents when they were about nine or ten years old so we could listen to their stories and learn about all of our relations and our history.

5. In the late 1950s I was sent away to BIA boarding schools at Wrangell, Alaska and Chemawa, Oregon. This is where I learned English. Before that we didn't speak English at home; my dad knew a little because he went to school up to third grade. My parents must have hated sending us away to boarding school but they really wanted us to get an education and to know about the law and how to protect ourselves and our land.

6. I graduated from high school in 1967 and signed up for the Bureau of Indian Affairs "relocation" program. I was sent to San Francisco where I was trained for clerical work and got a job with Blue Shield. My brother Albert was also in San Francisco; Gideon went to Chicago and Lillian was sent to Cleveland. Gideon came to San Fran-

cisco in 1970 and it was also in 1970 when news of my father's death reached us. We immediately went back to Arctic Village. That has been my home for all but two years since then, although I have traveled quite a bit in the past few years.

7. Immediately after our return to Arctic Village, we got involved in the village. Gideon and I went to a leadership workshop and I got a pre-school aide job. My son was born in 1973 and I lived in Fairbanks for a couple of years. After that I returned to Arctic Village and taught a high school class for one year, worked as a special education teacher's aide for three years, and then became the alternative village health aide. Eventually, I was the primary village health aide for about five years until 1985.

8. I always heard my parents talk about the Reservation and how we had to keep our land. In fact, protecting all the land we used was so important to my family that my parents sent my sister Nena down to San Francisco in early 1970 to get us to sign our applications for our Native allotments. My parents explained the allotments as the "border around us." My mother explained that I had lots of relatives in Venetie and sometimes I met them when they came up to Arctic Village to visit, hunt or spend the holidays. The people in Venetie are like the same family to us in Arctic Village and we try to stay close. In the older days, even when communication was very difficult, we always knew who was staying where. People were always on the move for food and survival.

9. As long as I can remember there was a village council in Arctic Village. The Village Council deals with village affairs such as kids causing problems and runs the generator and the washiteria. I was elected to the Arctic Village Council for one-year terms approximately three times in the period between 1970 and 1990.

10. In 1976 I was elected to the Tribal Council. The Tribal Council is made up of members from both Venetie

and Arctic Village and is also called the IRA Council or Tribal Government. The people in Venetie always vote for me to be on the Council. The Tribal Council deals with land issues like easements, management, land use, and with tribal membership. It occupies a higher position above the village councils. The Tribal Council also posted a tribal law prohibiting all alcohol on the reservation and limited churches to the Episcopal Church only. When outsiders want to come onto our land, the Tribal Council will decide whether to grant permission and will tell them to follow tribal law while on our land. I have been elected to the Tribal Council to serve a three-year term three different times. During this last election I did not run for re-election because I have had to travel so much and because I planned to stay in Fairbanks for medical reasons. However, in June, 1993, I moved back to Arctic Village to stay there.

11. For the past several years I have worked and traveled for my people to protect the calving grounds of the Porcupine Caribou herd. We are the Caribou People; without caribou we won't be a people. Seventy-five percent of our diet is wild meat and most of it comes from caribou. I have been speaking to church groups, Indian gatherings, tribal meetings, and college campus groups across the country and in Canada. I figure I am just carrying on the tradition of my grandfather Albert Tritt and my father and sister Nena; they always stood up for what they thought was right. It runs within the Tribe, generation to generation, I guess, to work to protect the land and the caribou so they will be passed on to the next generation.

12. As a Tribe we have to make a lot of sacrifices to exercise our rights without outside interference. We turn down outside support if it would jeopardize title to our land and sometimes this causes hardships. For instance, sometimes we can't get grants for new housing, road and

airstrip improvements and things like this if it would mean giving up title to our land. We also have to protect what is going on all around the borders of our land, not just the land inside the boundaries of the Reservation.

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF ALASKA

(Title Omitted)

NARRATIVE TESTIMONY OF ERNEST ERICK

1. My name is Ernest Erick and I reside in the Native Village of Venetie. I was born in 1956 in Fort Yukon and am 37 years old. My father is John O. Erick, Sr. and my mother is Maggie Roberts. My father's parents are Paul and Natalie Erick. My mother's parents are James Roberts and Myra Whiteye Roberts. My mother was born and raised in Venetie along with the remainder of her family. My father and his father, Paul Erick, are from Kahtsik, also known as Robert's Fish Camp.

2. The first seven years of my life were spent living between Robert's Fish Camp, Venetie and Fort Yukon. When I was seven years old we moved to Canyon Village, which is north of Fort Yukon on the Porcupine River. I lived there with my seven brothers and parents until 1965. We moved back to Fort Yukon where my mother died during childbirth. Then I moved to Venetie with my father and eleven children when I was about eight or nine years old.

3. Ever since I was about 10 years old I provided for myself and my younger brothers and sisters by gardening, hunting, picking berries, taking care of dogs and by hauling wood and water for our use. I was the fifth child in my family and learned how to do these things from my grandmother, my father, Chief David Henry, Donald Robert and Hamel Frank.

4. I went to a BIA school in Venetie until I was about sixteen years old and then to Mt. Edgecumbe for one year in 1973 and then back to Venetie for one year. I went then to Job Corps training program in Montana for a year to learn to operate heavy equipment. In 1975 I moved back to Venetie and worked for the Tribal Government in Venetie and Arctic Village and also earned money by selling wood and trapping. I worked on the North Slope from 1975-82 and made my home in either Arctic Village or Venetie. When in Arctic Village I spent much time with Moses Sam, who is a relative. I spent time hunting with John Titus, Trimble Gilbert and other people my age. In 1979 I moved back to Venetie; but continued to work on the North Slope.

5. I moved to Galena in about 1982 and lived there for about three years. When I was in Galena I went subsistence hunting with local people and taught them what I knew about hunting from my experience. In 1984 I moved back to Venetie to help the tribe and my family. I got married to my wife, Donna Becker, in 1983. While I was away I was in constant phone contact with my family and came back about three times a year to hunt caribou for my grandmother. I also spent a good deal of time visiting friends and relatives and attended a Tribal Government meeting where financial concerns and educational matters were discussed. I asked for and received a small loan from the Tribal Government so I could move back to Venetie.

6. I support my family by hunting, fishing and trapping. My trapping takes place in the area of Robert's Fish Camp and also northwest of Venetie in areas that are not being used by other tribal members for trapping. I usually earn some cash by working at construction and as a heavy equipment operator. Jobs in the village are usually given out first to qualified tribal members and then to others who live in the village. These matters are usually decided at community meetings.

7. A typical day's activities include hauling water from the river, cutting wood for heat and cooking, fishing, trapping, or hunting, depending on the season. The addition of an electrical generator and other modern conveniences have changed the way we live in some ways, but traditional law and custom still define the way we live and behave. Other tribal members generally support themselves in the same way. Hunting parties of several people will go out in search of game and camp for several days and wait for the arrival of caribou. When to begin hunting is usually decided by the First Chief and the elders in the community. If the hunt is successful, the meat is distributed to family members, elders and other tribal members. The traditional sharing network takes special care of elders, single mothers and those who for some reason are not able to hunt for themselves. There are areas near Venetie that I use for cutting wood. Since my father is from Robert's Fish Camp, I have decided to build a cabin there for my family's use.

8. I do not have a Native allotment in my own name because I was too young to file for one before the Native allotment act was repealed in 1971. I have inherited a share of my father John Erick, Sr.'s Native allotment which is at Fish Camp (Kahtsik) and is marked #72 on the Native allotment map. My sister Vera also has a Native allotment in that area, marked at #74.

9. There is a village council in both Venetie and Arctic Village. I have served on the Venetie Village Council since 1985 and am still a member of the Council. I was the First Chief of the Village Council in 1990-91. I also served as a member of the Native Village of Venetie Tribal Government from 1987 until 1993. I was the First Chief of the Tribal Government from 1987-90. The Tribal Government meets about four times a year, but this depends on whether there is serious business that needs to be considered. Once a year there is an annual meeting where the tribal members from both villages gather.

10. The Tribal Government usually makes the laws and the village councils enforce them on a daily basis. Almost all of our law is traditional, but the minutes of the 1962 Common Council meeting have a number of our customary laws written down. Village councils also pass resolutions at times. The village councils go to the First or Second Chiefs about problems.

11. The Tribal Government makes all the rules governing control and use of the land. This includes dealing with trespassers and non-members who want to hunt or hike within the reservation. The Tribal Government also deals with adoptions. We call ourselves the Neets'aii Athabaskan Gwich'in and we alone govern the people, animals, land and water within the former reservation.

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF ALASKA

(Title Omitted)

NARRATIVE TESTIMONY OF EDDIE FRANK

1. My name is Eddie Frank and I live in the Native Village of Venetie. I am a member of the Native Village of Venetie Tribal Government. I was born in Fort Yukon in 1949. My mother is an Aleut who grew up in the Valdez/Cordova area. She was married to John Fredson until he passed away and then she married my father. My father is Dan Frank who stayed in the Venetie area and especially spent time at "Gold Camp," which is west of the reservation boundary.

2. My mother taught school in Beaver for a year and then our family moved back to Fort Yukon, where we lived until I was 10 years old. In 1960 our family moved to Chalkyitsik where my mother taught school. In 1965 our family moved to Kotzebue where my mother taught school until 1972.

3. I attended high school in both Kotzebue and Unalakleet, completing my senior year at Unalakleet. After high school, I spent a year at Sheldon Jackson in Sitka. After Sheldon Jackson, I spent three months in New Mexico attending Southwestern Indian Polytechnical Institute. I returned to Alaska in June of 1972 and entered the University of Alaska-Fairbanks that same fall.

4. In the spring of 1973 I married an Eskimo woman and settled in Kotzebue, where I worked for as the fiscal manager for the Manilaaq Association until 1980.

5. I was originally enrolled as a Fort Yukon shareholder under the Alaska Native Claims Settlement Act,

but in 1973, after talking to Robert Frank, Sr., I appealed my enrollment to change it to Venetie, which was granted.

6. My wife and I have 4 children. All the children were automatically enrolled as members of the Native Village of Venetie Tribal Government.

7. While living in Kotzebue I made a trip in March of 1980 to visit my father and realized that Venetie was a good place to live. There was no problem with alcohol as there was in Kotzebue and in many other places. I talked my wife into moving to Venetie and we returned to take part in the good life that you can have there.

8. In the years since I returned to Venetie I have been a council member on the Native Village of Venetie Tribal Government and have served or the Venetie Village Council as First Chief, as well as a council member. Upon my return I was appointed to a position on the Venetie Indian Corporation Board of Directors, which had been established under ANCSA. The corporation had received the legal title to the reservation in common with Neets'aii Corporation. Both corporations transferred their interests to the Native Village of Venetie Tribal Government in the late 1970s. The Venetie Indian Corporation is no longer in existence.

9. There are approximately 200 people who currently reside in Venetie. There are only about 10 non-Natives who live here and they are all school teachers. There is one store in the village and it sells basic food supply staples such as canned goods, rice, candy, some clothing, ammunition and frozen meat. In general the prices are about two and a half times as expensive as in Fairbanks and can be even more depending on the product. There is a washeteria for community use that has indoor plumbing and running water for showers and clothes washing. The only other indoor plumbing in Venetie is in the school facility. There is an Indian Health Service Clinic, a post office and an Episcopal church in Venetie as well. There

is also a building that houses the Tribal Government offices and the village council offices; a community hall where we have public meetings, dances, potlatches and any other large gatherings. Most people get by through hunting, fishing, and trapping, although the trapping business has been down lately due to low prices. There is some seasonal work available such as fire fighting or construction work if there is project of some sort being built. Tribal members from Arctic Village often visit and this is especially so during the Thanksgiving and Christmas holidays, the Fourth of July celebration and the Spring Carnival.

10. Ever since I have lived in Venetie I have known of the governmental structure. The local system of government includes local village councils in both Venetie and Arctic Village. They are known as the Venetie Village Council and the Arctic Village Council. The local village councils are elected by Tribal members who reside in the village. Ballots for the elections are given by the election board only to tribal members entitled to vote in the respective elections.

12. The Native Village of Venetie Tribal Government is organized under the Indian Reorganization Act. It has nine members who serve for three year terms. There is a First Chief and a Second Chief. Only members of the Tribal Government can vote in the Tribal Government elections, but the members do not have to reside in either village. In the past, we have designated individuals to collect votes from members who reside in Fort Yukon or Fairbanks.

13. The division of authority between the village councils and the Tribal Government can not always be stated in specific terms, but it is based on historic practices and the common understanding of tribal members and the various council members. For example, the Tribal Government has the responsibility of dealing with outsiders and all matters related to the land. Tribal Government

approval is required for companies that want to do business on the reservation. It also deals with any matters that are of concern to all the tribal members. One example would be the prohibition on the consumption or importation of alcohol. The Tribal Government has adopted the prohibition and the local village councils enforce prohibition.

14. Natives from other communities may be allowed to set up residence in Venetie, but that requires the approval of the Tribal Government. The same is true with respect to non-Natives who may wish to move to the reservation. I believe the Tribal Government has taxing power and the authority to make all land use decisions such as leasing, or providing permits for access.

15. Child custody matters are referred to the Tribal Government if the State Division of Family and Youth Services involved. The village councils are also very interested and involved in child custody matters. The village councils also deal with family counseling matters and the Tribal Government also sometimes engages in family counseling and urging individuals to engage in proper behavior.

16. The Village Councils deal with day-to-day issues in the village like misbehavior by children and enforcement of the drug and alcohol prohibitions. People who violate the alcohol prohibition are required to meet with the village council and at that point a decision is made to fine the individual, or to ban him or her from the village for a time. Those suspected of vandalizing property are also required to meet with the council. If they are children, the parents are brought in too. The usual action is a little lecture from the council members.

17. The Village Councils and the Tribal Government act as courts. The division of authority depends on the kind of matter to be considered. Strictly local matters are dealt with by the Village Councils and things of broader concern are reviewed by the Tribal Government.

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF ALASKA

(Title Omitted)

NARRATIVE TESTIMONY OF ROBERT CHILDERS

1. My name is Robert Childers and I have been a public policy consultant in Alaska since 1974. I have lived in Alaska since 1972 and spent a substantial amount of time in rural Alaska. I came here after taking my BA in Environmental Studies with an emphasis on economics at UC Santa Cruz. I am 46 years old.

2. The focus of my work in Alaska has been related to ensuring local community involvement in State, National and International decision-making that affects local communities and their resources. Much of my work in the 1970s involved preparation for the D-2 planning process. In general, that process involved the identification of lands that were to be proposed for inclusion in the federal conservation unit system as a result of the passage of the Alaska Native Claims Settlement Act. I first worked with the Federal-State Land Use Planning Commission on various mapping projects involving the Arctic areas of the state.

3. In the late 1970s I traveled to Fort Yukon in my capacity as a contractor for the Rural Community Action Program (RuralCAP). My task was to work with Gwich'in Villages regarding the planning for the Arctic National Wildlife Refuge. It was during that process that I first made contact with representatives of Arctic Village and Venetie. It was during the process of developing the legislation that eventually became the Alaska National Interest Lands Conservation Act (ANILCA) that I first

became aware of the unique governmental structure and land status at Venetie and Arctic Village.

4. After the passage of ANILCA, I began to work with the Gwich'in villages on issues involving an international agreement for the management of the Porcupine Caribou herd. As a result of several years of negotiations, the United States and Canada signed the U.S. Canada Agreement on the Conservation of the Porcupine Caribou Herd. That Agreement established the International Porcupine Caribou Board, which is composed of eight members, with four from each country. I was the lead staff person participating at the direction of the Gwich'in villages. The object of the negotiations was to ensure that management of the herd would benefit the health of the herd and accordingly, the well-being of the Gwich'in people.

5. Since my initial visit to Venetie I have traveled to Arctic Village or Venetie approximately 40 or 50 times and have become very familiar with the political structure of the communities. I have gained this familiarity because it has sometimes been necessary for the Tribal government to take formal positions on various policy matters. Such decisions, in my experience, have only been made by the Tribal Government; the local village councils do not speak for the entire tribe on matters that I am familiar with. For example, a critical decision had to be made about the status of lands that would become part of the Arctic National Wildlife Refuge. In the other Gwich'in villages positions were typically made after community meetings set up by the tribal government for that community. With respect to Arctic Village and Venetie, however, important decisions were made by the Native Village of Venetie Tribal Government, which is the governing body of the entire former Chandalar Reservation and includes representatives from both Venetie and Arctic Village. It was that entity that made the decision respecting the ANWR issue and it is the Tribal Government that formally spoke for the Tribe in the Porcupine Treaty negotiations.

6. Since the mid-1980s I have been working with Gwich'in villages as a consultant on a project designed to establish a border-crossing agreement between the United States and Canada for the benefit of Gwich'in and other indiginous people. Venetie and Arctic Village speak through their Tribal Government as part of the Alaska Porcupine Caribou Commision, which is the Alaska organization formed to deal with the ongoing domestic issues affecting the herd.

7. I have not only traveled to Venetie and Arctic Village frequently, I have also been to Fort Yukon on numerous occasions and have been to the Gwich'in communities of Chalkyitsik, Beaver, and in Canada at Old Crow, Ft. McPherson, Arctic Red River, and Aklavik. In my view, the people of Arctic Village and Venetie are clearly viewed as a distinct tribal group, the Neets'aii Gwich'in, and are governed by the Native Village of Venetie Tribal Government. Each village has a local council that deals with local matters, but which is subject to the overarching authority of the Tribal Government. The Tribal Government exercises complete control over the former Chandalar Reservation. It is the undisputed owner of the land and carefully regulates all use of the land. I have seen no evidence of any other government exercising jurisdiction over the land owned by the Tribal Government, without the express consent of the Tribal Government.

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF ALASKA

(Title Omitted)

NARRATIVE TESTIMONY OF CLARENCE ALEXANDER

1. My name is Clarence Alexander and I am a 54 year old resident of Fort Yukon, Alaska. I am Gwich'in Athabaskan and belong to the Yukon Flats band of the Gwich'in. I grew up at a place known as "Alexanders' Village" which is near the southeastern border of the Venetie Indian Reservation. It was not really a village, but instead was a place where several families had cabins to use as a base for hunting, fishing and trapping. I spent the first twenty years of my life in that area, living a traditional lifestyle. The area was especially good for whitefish fishing and we would trade dried fish to the people of Venetie and Arctic Village for dried caribou.

2. In about 1960 I moved to the lower 48 states for education and employment. I attended technical school in Chicago to become a master machinist. I spent some time working in San Francisco and also moved back and forth to Alaska. In Alaska during the 60s, I was also worked for the Alaska Railroad and the State highway department as a surveyor's helper. In the 1970s I primarily worked in Fort Yukon as a bilingual program coordinator and language instructor. For the past ten years I have worked for the State subsistence division as community resource specialist. My job is to gather information regarding subsistence harvests and use by local residents.

3. From 1980 to 1993 I was the First Chief of the Native Village of Fort Yukon, which is a tribal government organized under the provisions of the Indian Reorganization Act. It is the recognized tribal government for Fort Yukon. During that time I was part of an effort that resulted in the establishment of the Council of Athabaskan Tribal Governments (CATG). That organization was formed to promote economic development among the Athabaskan villages located in the Yukon Flats and surrounding area. Participation is strictly voluntary, on a village by village basis. I was the first Chairman of the CATG and was recently asked to remain Chairman.

4. Because of my role as Fort Yukon's First Chief and my experience growing up near the Venetie Reservation, I am familiar with their political organization and with the use of the territory within the reservation and the surrounding area. It is my understanding that the people of Arctic Village and Venetie are united under one government that is called the Native Village of Venetie Tribal Government. That government deals with all matters related to land use and any matters affecting the tribe as a whole. Each village also has a local village council which handles local matters, but is under the authority of the Tribal Government. Of all the Athabaskan communities in the area, these are the only two who are organized under a unified tribal government over two communities. The Tribal Government exercises control over the entire land base which it owns.

5. The Tribal government has one of the only effective alcohol prohibitions in place that I know of. It is well known that alcohol and drugs are prohibited within the reservation boundaries and that people suspected of bringing those substances into the communities will be searched at the airport. I witnessed such a search myself on one of my trips to Venetie. It is well known that violators of the ban may receive a "blue ticket," which is a banishment from the community for a period of time.

6. The Native Village of Fort Yukon and other tribal governments in the region acknowledge the Native Village

of Venetie Tribal Government as the governing body of the entire land area that makes up the former Venetie Indian Reservation. Individuals who are not members of the Native Village of Venetie Tribal Government may use reservation lands, but only with the permission of the Tribal Government.

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF ALASKA

(Title Omitted)

NARRATIVE TESTIMONY OF JEFF WELTZIN

Jeff Weltzin will testify as to the contents of the letter marked as Plaintiffs' Exhibit #152.

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF ALASKA

(Title Omitted)

NARRATIVE TESTIMONY OF
MICHAEL STANCAMPIANO

1. My name is Michael Stancampiano and I am currently employed by the Bureau of Indian Affairs as a tribal operations officer for the Ute Mountain Ute Agency in Toawac, Colorado.

2. I graduated from the University of Oklahoma in 1968 and from the University of Oklahoma Law School in 1974. I served in Vietnam after I was drafted in 1969. I was assigned to the Army Intelligence division where my job was interrogating prisoners of war.

3. I practiced law in Oklahoma for several years as a sole practitioner and for the Cherokee Nation in eastern Oklahoma. I also worked for both the State of Oklahoma and for the Legal Services Corporation.

4. In 1981 I moved to Juneau, Alaska and began working for the Juneau Area Office of the Bureau of Indian Affairs. The BIA has three general levels. The Central Office in Washington, D.C. is responsible for the administration of all BIA programs and functions on a nation-wide basis. It is headed by the Assistant Secretary for Indian Affairs. Beneath the Central Office are twelve Area Offices which are headed by Area Directors and carry out programs and policies in large geographic regions. Next in line are the Agency Offices, which are headed by Superintendents. The Agency Offices provide

direct services to tribes. In Alaksa the Area Office is located in Juneau and Agency Offices are in Fairbanks, Bethel, Nome and Anchorage.

5. I worked in the realty section of the BIA for a short time and then worked in the tribal operations division for a time. The tribal operations division is responsible for assisting tribal governments in development of their court systems, works with tribes that wish to amend their constitutions, or draft constitutions for the first time. It assists in the development of tribal membership ordinances and distributes judgment funds, conducts secretarial elections, reviews tribal-agency contracts, prepares certifications of Indian blood and maintains files on tribal governments.

6. In 1985 I moved to Fairbanks to work in the Agency Office. I became the Agency Superintendent in 1986. I was thus responsible for the administration of all BIA programs in the Interior and North Slope regions of Alaska. Of course, many of the programs have been contracted out to the tribes pursuant to the provisions of the Indian Self-Determination Act. My staff, when I left in 1992, consisted of about 17 full time employees.

7. I became familiar with the organization of all tribes in the Interior region and worked with them in the delivery of BIA services.

8. I travelled to the communities of Arctic Village and Venetie on the former Chandalar Reservation on a number of occasions. There were three entities with which the Fairbanks Agency had dealings on a government to government basis. First was the Native Village of Venetie Tribal Government, which is sometimes known as the "Native Village of Venetie," or the "IRA Government." It is reorganized under the provisions of the Indian Reorganization Act and holds legal title to the entire former Chandalar Reservation. I understand that the land was transferred to the Native Village of Venetie Tribal Government

by the two Native corporations that were established pursuant to the Alaska Native Claims Settlement Act. This governing body represents everyone who resides on the former Chandalar Reservation and is composed of representatives from both Venetie and Arctic Village.

9. Each village also has a local governing body. They are known as the Venetie Village Council and Arctic Village Council. They operate as arms of the Native Village of Venetie Tribal Government. As such they were considered eligible for services from the BIA and the Fairbanks Agency Office did in fact enter into contracts and grants directly with the village councils as well as the Native Village of Venetie Tribal Government.

10. The tribal members within the former Chandalar Reservation have adapted their form of government over the years to respond to changing conditions. The local village councils effectively deal with strictly local matters while the Native Village of Venetie Tribal Government represents the entire tribal membership and governs the former reservation as a whole. The latter government deals with outsiders who wish to enter the reservation for business or other purposes.

11. Arctic Village and Venetie are distinctly Native communities. They do not have any other form of local government in their communities other than the local village councils and the Native Village of Venetie Tribal Government. I consider their system of government successful.

[Filed Feb. 22, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. F86-0075 Civ (HRH)

(Title Omitted)

JUDGMENT

The court having issued its decision in this case on the question of tribal status of the Neets'aii Gwich'in on December 23, 1994, in the consolidated cases of Native Village of Venetie IRA Council, *et. al* v. State of Alaska, *et. al*, F86-0075 Civ., and State of Alaska v. Native Village of Venetie Tribal Government, *et. al*, F87-0051 Civ.,

IT IS THEREFORE DECREED that the Neets'aii Gwich'in are a sovereign Indian tribe as a matter of federal common law; and

IT IS FURTHER ORDERED that the State of Alaska shall give full faith and credit to adoption decrees issued by the tribal courts of the Neets'aii Gwich'in tribe, including the adoption decree issued in favor of Nancy Joseph, to the same extent as the State of Alaska gives full faith and credit to the adoption decrees of any other entity.

Dated this 20 day of Feb., 1995.

/s/ H. Russel Holland
H. RUSSEL HOLLAND
United States District Judge

[Filed Jan. 30, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. F86-0075 Civ (HRH)
(Title Omitted)

FINAL JUDGMENT

The court having issued a Judgment on the question of the tribal status of the Neets'aii Gwich'in on February 22, 1995, and having issued its decision on the tribal status of the Native Village of Fort Yukon on September 20, 1995, as clarified in its Order (Motions for Reconsideration) of December 12, 1995, and the parties having stipulated that the Native Village of Fort Yukon IRA Council would produce at trial sufficient evidence to satisfy the common law tests for tribal status and to the entry of a final judgment resolving the plaintiffs' claims,

IT IS THEREFORE DECREED that the Native Village of Fort Yukon is a sovereign Indian tribe pursuant to the Secretary of the Interior's October 21, 1993, published list of federally recognized tribes and as a matter of federal common law; and

IT IS FURTHER ORDERED that the State of Alaska shall give full faith and credit to adoption decrees issued by the tribal courts of the Neets'aii Gwich'in and of the Native Village of Fort Yukon, including the adoption decrees issued in favor of Nancy Joseph and Margaret Solomon, to the same extent as the State of Alaska gives full faith and credit to the adoption decrees of any other entity.

Dated this 20 day of Jan., 1996.

/s/ H. Russel Holland
H. RUSSEL HOLLAND
United States District Judge

[Exhibit 6]

OFFICE OF INDIAN AFFAIRS
FIELD SERVICE

Chandalar, Alaska.
Written at Fort Yukon, Alaska.
Jan. 1st. 1938.

RESVERATION

If the Chandalar school is to be permanent, in our opinion, the first big step is to put that section of the country under resveration.

There is no trader there now.

The people want the resveration. And they realize that the time has come when such action is necessary to protect their fur and game.

Please note the petitions attached. This is the story. The planes are rapidly changing the methods of trapping. Two of the residents took a plane this fall and in a short time came back with one hundred marten. How long can this keep up?

We suggest that a section of the Chandalar country be made into a resveration for the Natives. Attached is a map. Also the possible boundaries.

John Fredson

Please forward to Mr. Hirst.

[Map Omitted in Printing]

RETYPED

[Exhibit 9]

Juneau, Alaska.
June 17, 1929

Mr. John Fredson,
U.S. Government Teacher,
Chandalar, Alaska.

Dear Mr. Fredson:

In discussing with Mr. Engerty the matter of preparing a justification for a reservation for Chandalar natives it occurs to me that additional information entered on the enclosed map would be quite helpful. You may use this map as a working copy and I will prepare a finished copy to be submitted with the final report, thus saving you valuable time in the field. Please make all entries on the map in pencil, keeping them as legible as possible and supplementing them with explanatory information on a separate sheet. Any information you can furnish in addition to that suggested in this letter will no doubt be very helpful.

BOUNDARIES: In view of the fact that the land is unsurveyed, it will be necessary to describe the boundaries of the reservation by metes and bounds. The boundary should include approximately the area over which the Chandalar natives have exclusive trapping rights and should avoid including any area which would give rise to contention between the chandalar natives and the natives of neighboring communities. The following statement of boundaries is purely tentative and is suggested for what help it may be to you in describing boundaries of the reservation as you believe they should be.

SUGGESTED BOUNDARIES: Beginning at a point on the main stream of the Chandalar River where the Christian River enters the Chandalar and proceeding in a general northwesterly direction following the meanders of the Chandalar River to the point where the Middle Fork

of the Chandalar enters the main stream; thence in a general northwesterly direction following the meanders of the Middle Fork to the 68th Parallel cuts across the watershed of the Christian River, thence in a general southerly direction following the meanders of the Christian River to the point of beginning.

I have in mind that establishing the eastern boundary of the reservation at the Christian River might have the affect of preventing some trader or other person from establishing a post and selling liquor within a very short distance of the village. If there is some other stream or distinct natural boundary at some point between Christian River and the East Fork of the Chandalar River, it might be advisable to use it as the eastern boundary of the proposed reserve. We, of course, do not want to ask for any more land to be reserved than we can actually use, but we do want to keep the boundaries far enough from the village to give us some reasonable control over the sale of liquor. If you have such a boundary in mind, please indicate it on the map and give us additional explanation.

LOCATION OF VILLAGES AND FISH CAMPS: You will note on the enclosed map that Chandalar is located quite close to the Christian River. It seems to me that it is nearer the south of the East Fork. You and Jimmy Roberts and the others will be able to give its location more accurately. In addition to indicating the location of Chandalar Village you should show the site of the following:

All trapping cabins, camps and trails.
Approximate location of trap lines.
Place where Chandalar people hunt of caribou, sheep and moose.
Fish camps.
Muskrat lakes.

Indicate in parenthesis at the site of each village or camp the total resident population of the village.

COMMUNICATION AND TRANSPORTATION: In addition to information already on the map and other entries that you will make, you should show the following:

Dog team trails.
Shelter cabins for travelers.
Boat landings and sites where freight can easily be unloaded from river boats.

You should also indicate the nearest place where the White Pass and Yukon or other commercial navigation companies operate their regular steamers. Also the nearest postoffice and any amateur radio stations that are in operation within the proposed area or in immediately adjoining territory.

USE OF LAND AND RESERVES BY WHITE OCCUPANTS: Attached is a copy of the Reserve Act on which I have indicated in red the provisions applying to any claims to the use of unreserved land which may now be in effect. You may have occasion to refer to this if local people get concerned about the effect of a reserve on interests they already have established.

On your map you should also indicate the following:

Location of trading posts.
(This should show the little store which Jimmy Roberts operates and indicate that it is managed by a native.) If Jimmy is subsidized by the Northern Commercial Company or some other Fort Yukon trader, this should be explained.)
Location of mines now in operation.
Location of timber claims and wood cutting.
Routes of operation of freight or passenger boats owned by whites.
Any other white use or occupancy.

We realize that the information requested here will require much time and labor in its preparation. However, we feel sure that you agree with us that the establishment of a

reservation is fundamental to the economic welfare of those people. We, in turn, do not wish to submit a request for a reserve that is not adequately supported by full and complete data. Therefore, we are relying upon you to get this information in our hands in as complete a form as possible and at an early date so that it may get submitted to the secretary of the Interior.

I am sending back to you certain population data and rough maps which you and Jimmy were kind enough to supply for my information over a year ago. It occurs to me that these might be useful to you in filling in the large map we are forwarding. I would appreciate having those materials returned to me with the large map when you have finished with them.

Very sincerely,

GEORGE A. DALE,
Assoc. Super. Elem. Educ.

Enc.
GAD:MB

Alaska
DET

Apr. 7, 1938

Mr. John Fredson,
Teacher, Indian Service School, Chandalar,
via Fort Yukon, Alaska.

Dear Mr. Fredson:

At a recent conference in this office consideration was given to the setting up of a reservation for the benefit of the natives in the vicinity of Chandalar, as outlined in your recent communication on this subject. Mr. Hirst, who has been in Washington for some weeks, was present at this conference.

In the setting up of reservations for the benefit of the natives of Alaska the customary procedure is for the natives, with the assistance of the local teacher, to prepare a petition asking that the reservation be made for their benefit, which petition should set forth in detail the need for the reservation and be signed by as many of the adult Indians as are in favor of the petition. This should be forwarded by the teacher to this Office, through Mr. Hirst, at Juneau. The procedure and the kind of information required are set forth in the enclosed mimeographed circular entitled "Instructions for Organization in Alaska under the Reorganization Act of June 18, 1934 (48 Stat. 984), and the Alaska Act of May 1, 1936 (49 Stat. 1250), and its Amendments thereto." It is possible for the natives to secure a reservation for their benefit without being organized.

Please study the enclosed instructions and explain them to the Indians at Chandalar. If the Indians have any form of local organization they should prepare a petition for the setting up of a reservation, which should be signed by the officers and all adult Indians in favor of a reservation. It is suggested that you assist them to the fullest extent possible and transmit the required information and peti-

tion to Mr. Hirst, at Juneau. Mr. Hirst hopes to be able to visit Chandalar during the spring or early summer and will take up this matter further with you. However, you should not wait for his visit before proceeding with the petition and the forwarding [illegible words deleted] that you communicate with the Juneau office, by radio if possible.

Sincerely yours,

WILLIAM ZIMMERMAN, JR.
Assistant Commissioner.

cc-Juneau office.

cc-Mrs. Charlotte T. Westwood,
Solicitors' Office,
Interior Department.

Enclosure 1347095.

[Exhibit 10]

Chandalar
P.O. Fort Yukon, Alaska

July 12, 1938

Written at
Fort Yukon.

Mr. William Zimmerman,
Assistant Commissioner Of Indian Affairs,
Washington, D.C.

Dear Mr. Zimmerman:

Your letter of April 7th, with the enclosure number 1347095 came sometime ago. Thank you very much. The letter and the enclosure has to do with the setting up of a reservation for the benefit of the natives in the vicinity of Chandalar.

I have been working on the reservation since the instructions came, but I see that it will take time. I wrote a letter over to Arctic Village but it is difficult because no one reads or writes English over there. And since these people are forced to fight for their next meal from the open country, it is not easy to get them together at once. The people of Arctic Village answered my letter in native and stated that though they like to do what is best for their land, they cannot sign as they do not know the meaning of "Reservation." This fair enough. Those I have spoken to in person thoroughly approve the idea. But it will take time as I said.

Sincerely,

/s/ John Fredson,
JOHN FREDSON

[Exhibit 11]

Juneau, Alaska
October 18, 1938

Memorandum to Mr. Hagerty:

As a result of the conference with the Assistant Commissioner, attended by Superintendent Hirst and yourself at which Mr. Zimmerman expressed the opinion that the Constitutions and Charters being used in Alaska were too complicated and that we might suggest simpler and shorter instruments for use, especially by the extremely primitive people of the west and north, and in view of the opinions contained in letter from the Secretary's Office Dated September 17, 1938, I have drawn up a sample constitution, by-laws and charter which I think would be more satisfactory.

To utilize existing procedure as much as possible, the documents follow in abbreviated form the instruments approved by Washington. Simpler words have been substituted in many cases (restrict, pending, ratified, prescribed, promote, referendum, respective, eligible, etc. have been eliminated). Other synonyms than those I have used may be more appropriate. The easiest words to translate should be used. Titles and petitions have been eliminated and many sections have been generalized. For instance, in the by-laws instead of detailing the duties of the Secretary and Treasurer I have summarized them, assuming that if more detailed instruction is necessary the Council will give such verbal or written orders under authority conferred on it by Sections 2, 3 and 4. Also in the charter I have eliminated much detail in the powers of the corporation, summarizing these in a three-line section numbered 5. Possibly additional blanket clauses could be used to further shorten or simplify the instruments which have been examined quite informally by an attorney, and from a legal viewpoint are probably fairly satisfactory.

You are aware that many of the native villages now have a very informal method of conducting community affairs.

Some villages have chiefs selected in one way or another; some villages have groups of "hand-men" who conduct community business. I do not think it wise to try and substitute what to us may appear to be a lack of system by too much system, but rather make the informality formal, adding thereto just as much as may be absolutely necessary for the present. It appears superfluous for instance, to provide that resigning members shall submit formal written resignations. This procedure would probably not be followed even if the simple villager could write and if paper and ink were available. In many villages they are not. Therefore it is needless to include such a provision in an Eskimo, Aleut or Interior Indian constitution.

I did not think it necessary to include the "Order of Business" and some other provisions which extend the length of the by-laws, add to the difficulties of the interpreter and to the confusion in the minds of primitive people, or at least many of them. The villagers will be coached by the teacher and procedure and simple rules adopted by the council who will not likely use Robert's Rules of Order as provided, because unavailable and unintelligible.

Mr. Hawkesworth examined the documents attached, made some suggestions and concluded that the instruments would be satisfactory. Using them as a basis may be of assistance in making further revisions of existing documents if you think necessary, and the resulting instruments submitted to Mr. Hirst for his approval. Whatever forms are submitted to Washington should be more suited to Alaska than those in present use. They should be short, worded in the simplest language, so as to be understandable, at least in part, by natives with some knowledge of English, and which can be readily translated into the native languages, dialects and idioms, by the class of interpreters available. Interpreters must be used in all the western and northern Alaska villages and I have had to use

several who did not know equivalents for some of the words and phrases in documents now being used, and therefore could not translate the sense of parts of the instruments, so as to be intelligible to the extremely primitive people.

Reference in the 4th paragraph of letters from the Secretary's Office to "reflecting more faithfully the customs and usages of the groups" is noted. If such are to be referred to then the particular custom or usage should be mentioned specifically because some Alaska native customs and usages are repugnant to law (in matters of inheritance for instance), and many are not in harmony with programs for business, sanitation, health, etc. However, in the bylaws it is provided that the business of the council shall be conducted according to "local customs or suitable rules to be adopted" and in the charter for the Council "to do such other things as may be necessary in the conduct of its business, which are not contrary to law and regulations." This gives authority within prescribed limits for utilization of local established customs and procedure, and I think complies, at least in part, with the Secretary's intent. I am thoroughly in agreement with this paragraph of his letter, always have been, and long ago expressed the opinion that we should build up from the customs and capacity of the Indians instead of imposing entirely new procedure upon them which often is beyond their ability to comprehend or to comply with. (See statement of policy by Mr. Collier, Circular 3011 in this connection.)

There are a number of villages where, in addition to the school establishment, there will be a trader or two, maybe church, a few intelligent natives, some with a fair knowledge of English, etc., where a more detailed constitution and charter might be usable. However, it is believed that the simplest basic forms should be approved and be available for general use. Forms should be applicable to the village of Tucbuc, consisting of 18 houses (really miserable shacks) ocupied by some 90 people, in which village

there is no school, store, church, no modern conveniences of any kind whatever, to which the very pen and ink would have to be taken to sign a petition for a charter in which probably not ten of the people can understand English. Umnak and Atka where organization is needed are villages similar to Tucbuc but more fortunate in having resident government representatives.

In conclusion, what I would prefer to see done would be for authority to be extended to the General Superintendent or the Organization Field Agent, to draw up simple constitutions, by-laws and charters on the ground in consultation with the native people. This would involve ascertaining from the Washington Office what powers, procedure, etc. would be considered necessary and what powers, procedure, etc. might be considered as optional and included in or left out of instruments. Then have meetings with several communities where some sort of native community government now exists and industrial activity is carried on. Flim for instance has a mayor, council, marshal, etc. Unalakleet and Kwikluk have memberships in reindeer associations.

Have such groups state their method or the method they would like adopted to select members, create a council, remove officers and members, etc. Then when we would have several of those native proposed constitutions, charters, etc. make a consolidated resume of all and submit to Washington for approval. I believe this would be more truly democratic government of the natives and conduct of business according to their own methods and capacity to manage, then procedure which may be designed elsewhere and without native participation. Build up in the field from the native basis, however primitive it may be, rather than down from an elaborate structure devised elsewhere.

P. J. FITZSIMMONS,
Credit Agent.

[Exhibit 17]

RETYPED COPY OF LETTER

Juneau, Alaska
January 25, 1940

Commissioner of Indian Affairs
Washington, D.C.

Attention: Mr. William Zimmerman, Jr.

Dear Sir:

Transmitted herewith are two copies of an application for reserve of certain lands for the use of the natives living in Venetie, Alaska and the neighboring communities of Arctic Village, Christian Village and Robert's Fish Camp. Although these villages are some distance apart the people are from closely inter-related families and use in common the game, fur and fish which are the chief resources of the area. The area requested for them is described as follows:

Beginning at the center of the upper mouth of the Chandalar River at the point where it enters the main channel of the Yukon River (known locally as Venetie Landing) and following the center of the main channel meanders of the Chandalar River in a general northwesterly direction to the mouth of East Fork of the Chandalar River; thence following center of the channel meanders of the East Fork in a general north and east direction to the intersection of East Fork with Tritt Creek (known locally as Vunye-cha-jik); thence east and north following mid-channel meanders of Tritt Creek to its intersection with 145° 30′ West longitude (a point approximately 12 miles east and 2 miles north of Arctic Village); thence due south following 145° 30′ West longitude to intersection with Otter Creek (a point approximately 6 miles northeast of Simon's Cabin); thence west and south

to Christian River; thence in general southerly direction following midstream meanders of Christian River to point of intersection with Cutoff Slough; thence south and east to back Yukon slough; thence west to main channel of Yukon River; thence following northern bank downstream in westerly direction to Venetie landing and point of beginning.

The native Indians of this region have always been self-maintaining but their income is being threatened by the intrusion of white trappers who enter the region by airplane and reach trapping grounds which are inaccessible to the natives by dogteam. These white trappers are interested in securing all the fur possible and overtrap the country leaving insufficient breeding stock to assure a continuing fur crop sufficient to maintain the native population. A reservation is necessary to protect this well-established and to date self-maintaining economy of the native people.

The area requested by the natives does not include any established mines, trap lines, or other white interests. The Territorial Cadestrial Engineer reports that there are probably several mining claims within the proposed area but none of them are of record. To date the no-native occupancy of this area is negligible. Therefore, there is no problem involving non-native occupancy. The people of this area are a fine group of Indians, relatively free from white influence and from such undesirable factors as liquor. Their health appears to be above average. At their own request a school was established in 1937. Their initiative is indicated by the fact that they have provided their own school building. The teacher is a native of this community who has secured an education and is rendering excellent service to his people.

In view of the above facts I recommend that the area described be set aside for the protection and benefit of the native Indians of Venetie, Arctic and Christian Villages and Robert's Fish Camp and that all intoxicating liquors be prohibited within the boundaries of the requested reserve.

Respectfully submitted,

CLAUDE M. HIRST
General Superintendent

CGS:AVM

RESERVATION APPLICATION OF CHANDALAR AND CHRISTIAN RIVER AREA

PETITION

Venetie, Alaska
December 26, 1939

The Honorable Secretary of the Interior
Washington, D.C.

Sir:

We the legal voters of the village of Venetie hereby respectfully petition that the following described tract of land be set aside as a reservation for the use and benefit of the native citizens who reside within this area:

LEGAL DESCRIPTION

Beginning at the center of the upper mouth of the Chandalar River at the point where it enters the main channel of the Yukon River (known locally as Venetie Landing) and following the center of the main channel meanders of the Chandalar River in a general northwesterly direction to the mouth of East Fork of the Chandalar River; thence following center of the channel meanders of the East Fork in a general north and east direction to the intersection of East Fork with Tritt Creek (known locally as Vunye-che-jik); thence east and north following midchannel meanders of Tritt Creek to its intersection with 145° 30′ West longitude (a point approximately 12 miles east and 2 miles north of Arctic Village); thence due south following 145° 30′ West longitude to intersection with Otter Creek (a point approximately 6 miles northeast of Simon's Cabin); thence west and south to Christian River; thence in general southerly direction following midstream meanders of Christian River to point of intersection with Cutoff Slough; thence south and east to back Yukon Slough; thence west to main channel of

Yukon River; thence following northern bank downstream in westerly direction to Venetie Landing and point of beginning.

Docho Spasoff

James Roberts

Silas John

Nathaniel Frank

Paul Tritt

Jonas Roberts — Witness: John Fredson
Witness: Jean R. Fredson

Joe Peter

Rufus Roberts

Solomon Flitt

Peter Joseph

Herrun Frank

Henry John

Sophie Henry

Ned Roberts

Anna Roberts

Annie Cadzoa

Elizah John

Etirum Fredson

Jimmy Golen

Laura Golen

John Frank

Sarah Frank

Andrew Roberts

Agnes Roberts
Martha Frank
Jonas Roberts
Sarah Roberts
Ervin John
Mary Enook
Myria Roberts
Daniel Roberts
Nena Roberts
David Henry
Ellen David Henry
Julia Tritt
Allah Frank
John Fredson

PETITION

(Robert Fish Camp)
Kachick, Alaska
October 4, 1939

The Honorable Secretary of the Interior
Washington, D.C.

Sir:

We the legal voters of the village of Kachick hereby respectfully petition that the following described tract of land be set aside as a reservation for the use and benefit of the native citizens who reside within this area:

LEGAL DESCRIPTION

Beginning at the center of the upper mouth of the Chandalar River at the point where it enters the main channel of the Yukon River (known locally as Venetie Landing) and following the center of the main channel meanders of the Chandalar River in a general northwesterly direction to the mouth of East Fork of the Chandalar River; thence following center of the channel meanders of the East Fork in a general north and east direction to the intersection of East Fork with Tritt Creek (known locally as Vunye-che-jik); thence east and north following midchannel meanders of Tritt Creek to its intersection with 145° 30′ West longitude (a point approximately 12 miles east and 2 miles north of Arctic Village); thence due south following 145° 30′ West longitude to intersection with Otter Creek (a point approximately 6 miles northeast of Simon's Cabin); thence west and south to Christian River, thence in general southerly direction following midstream meanders of Christian River to point of intersection with Cutoff Slough; thence south and east to back Yukon Slough; thence west to main channel of Yukon River; thence following northern bank downstream

in westerly direction to Venetie Landing and point of beginning.

Chief Robert	Witness: Andrew Roberts Witness: Margaret Paul
Charlotte Robert	Witness: Tommy John Witness: Andrew Roberts
Isaac John	
Big Eric Isaac	Witness: Elizah John Witness: Tommy John
Rachael Eric	Witness: Elizah John Witness: Tommy John
Natholic P. Eric	
Margaret John	
Margaret Paul	
Paul Eric	
Paul Jans	

PETITION

Christian & Arctic Villages, Alaska
December 16, 1939

The Honorable Secretary of the Interior
Washington, D.C.

Sir:

We the legal voters of the village of Arctic & Christian Villages, respectfully petition that the following described tract of land be set aside as a reservation for the use and benefit of the native citizens who reside within this area:

LEGAL DESCRIPTION

Beginning at the center of the upper mouth of the Chandalar River at the point where it enters the main channel of the Yukon River (known locally as Venetie Landing) and following the center of the main channel meanders of the Chandalar River in a general northwesterly direction to the mouth of East Fork of the Chandalar River; thence following center of the channel meanders of the East Fork in a general north and east direction to the intersection of East Fork with Tritt Creek (known locally as Vunye-che-jik); thence east and north following mid-channel meanders of Tritt Creek to its intersection with 145° 30′ West longitude (a point approximately 12 miles east and 2 miles north of Arctic Village); thence due south following 145° 30′ West longitude to intersection with Otter Creek (a point approximately 6 miles northeast of Simon's Cabin); thence west and south to Christian River; thence in general southerly direction following midstream meanders of Christian River to point of intersection with Cutoff Slough; thence south and east to back Yukon Slough; thence west to main channel of Yukon River; thence following northern bank downstream

in westerly direction to Venetie Landing and point of beginning.

Jimmie Christian	
Gilbert Gasec	
Moses Sims	
Abraham Christian	
James Gilbert	
Peter Christian	
Kepril Peter	Witness: Jimy Christian Witness: Gilbert Joseph
Allice Gabriel	
Maggie Gilbert	Witness: Moses Sam Witness: Elah Frank
Lyey Frank	Witness: John Frank Witness: Elah Frank
Helen Peter	
Jurli Moses Sam	
Meitah Simon	
Sarah Simon	
Martha Simon	
Andrew Simon	Witness: Sarah Simon Witness: Martha Simon

RESERVATION APPLICTION OF CHANDALAR AND CHRISTIAN RIVER AREA

POPULATION:

The residents of the proposed reservation live principally in Arctic Village, Robert's Fish Camp, Venetie and Christian Village however during the winter they are required to move to hunting and trapping grounds where they live in small cabins built for the purpose and during the summer they move to the various fishing grounds to catch fish for food for themselves and for their dogs. These people find it impossible to provide sufficient food and clothing for themselves unless an extremely large area of land is covered by each family. The population of the four villages within the boundary of the proposed reservation is:

POPULATION OF PROPOSED RESERVATION

Name of Village	Number of Families	Total Population
Arctic Village	9	34
Robert's Fish Camp	5	27
Venetie	21	91
Christian Village	12	50
TOTAL	47	202

From census records U. S. Indian Service.

AREA:

The total area of the proposed reservation is estimated at 1,403,000 acres or 2200 square miles.

REASON FOR REQUESTING A RESERVATION:

The area, included within the boundaries of this reservation is used by these Native people as hunting, trapping

and fishing grounds upon which they must depend for their livelihood.

Well equipped white trappers go by plane into areas which are inaccessible to the Natives. These areas are recognized as the breeding grounds for the fur bearers of the reservation area. Through this depletion of the breeding stock, fur bearing animals are becoming more and more scarce each year and unless something is done to stop the ruthless exploitation and slaughter of game and fur bearing animals of this area those people will soon be compelled to request aid from the Government to prevent starvation. The fact that white trappers can fly into areas, that are inaccessible by dog team, and are taking out as much fur as two to three Native families can catch in one season, is tending to break the morale of these people as well as reduce them to poverty.

OCCUPANCY BY NATIVES:

The people of Venetie and neighboring villages have resided in their present locality for many years. They have lived off the country depending upon game and fish for a major part of their food supply and upon furs for their cash income. In order to use these widely scattered resources they have developed an extensive system of trails, traplines, hunting and trapping camps and fish camps. These trails and camps represent a considerable investment in time and labor.

The people of the four main villages of Venetie, Arctic Village, Christian Village and Robert's Fish Camp as well as of the small semi-permanent camps. Many of the trails and camps are used jointly by the people of the different villages. Such camps and trails are indispensable to the utilization of the resources of the region. Since the entire area lies north of the Arctic Circle, the resources are sparse and large areas are required for the support of a few people. Travel over these areas in search of game

and fur would be impossible without well developed trails and a sufficient number of shelter cabins or camps.

The people of this area have not to date established any trading posts of their own. They have been compelled to go to Ft. Yukon, 65 miles from Venetie, for all supplies, this journey requiring at least a 4 days round trip.

Since the school was opened at Venetie in 1937 considerable interest has been shown in gardening and the people of this village may supplement their food supply with potatoes and root vegetables from their own gardens. The need of protecting these resources from exploitation by whites is indicated by the following letter from John Fredson, U.S. Government Teacher at Venetie, Alaska:

Chandalar, Alaska
Jan. 1st, 1939

Dear Mr. Hirst:

If the Chandalar school is to be permanent, in our opinion, the first big step is to put that section of the country under reservation. There is no trader there now. The people want the reservation. And they realize that the time has come when such action is necessary to protect their fur and game.

Please note the petition attached. This is the story. The planes are rapidly changing the methods of trapping. Two of the residents took a plane this fall and in a short time came back with one hundred marten. How long can this keep up? We suggest that a section of the Chandalar country be made into a reservation for the Natives. Attached is a map. Also the possible boundaries.

(Sgd) John Fredson

Mr. Clyde G. Sherman
Office of Indian Affairs
Field Service
Nome, Alaska.

Venetie, Alaska
December 30, 1939

Dear Mr. Sherman:

The Chief of Venetie, John Frank, made a special trip to the Arctic Village country to get signatures for the proposed reservation. The Chief was gone about two weeks, had hard trail and he often had to camp out in the open. And did succeed in getting most of the signatures. All he saw signed, but a few were so far away that he could not reach them. The people of Arctic Village and Christian Village move back and forth so much that it is difficult to place them. At present they are camping a half way between the two places.

But Kachick and Venetie have all signed up.
With all good wishes,

Sincerely,

(Sgd) John Fredson

Note: See copy of Economic Survey on file in Indian Office for additional information. Kachick is the same village as Robert's Fish Camp.

CHARACTER OF THE LAND AND USES FOR WHICH IT IS SUITABLE:

The general character of the land within the boundaries of the proposed reserve is rolling and mountainous with a maximum elevation of approximately 3,000 ft. There are numerous lakes and marshes and small streams. The large area in the southern part of the reserve is flat and marshy. Much of this area is sparsely covered with a growth of scrub spruce, alder, moss and other arctic vegetation. The area is a natural range for caribou, mountain

sheep, moose and other game animals as well as for such fur bearers as muskrats, beaver, mink, marten, lynx and others. White fish are found in the streams and lakes although the number of salmon taken is small.

Since the land of this proposed reservation lies north of the Arctic Circle and that the level land along the Yukon River is very swampy and dotted with lakes there seems to be very little likelihood that this land will ever be valuable for agricultural purposes or be capable of supporting any other than a sparse population.

WATER AREAS WHICH ARE INDISPENSIBLE TO THE NATIVES

The Natives depend upon the rivers which form the boundary of their proposed reservation for their supply of fish for food and for feed for their dogs. The streams are also used as routes of transportation, in the summer by boat and in the winter by dog sled. For these reasons the Natives request that the center of the streams bounding the proposed reservation be made the boundary of their reservation.

THERE IS NO EXISTING RESERVATION WITHIN THE BOUNDARY OF THE PROPOSED RESERVATION.

OCCUPANCY AND USE OF LAND AND WATER IN QUESTION BY NON-NATIVES:

There are no non-native occupants within the proposed reserve area. The only use made of the resources is where white trappers invade the area by airplane to trap. This is particularly damaging to the fur resources of the country as white trappers get into otherwise inaccessible areas and are seriously depleting the breeding stock of fur animals.

POSSIBLE FUTURE USE OF LANDS AND WATER BY NON-NATIVES IN EVENT IT IS NOT RESERVED FOR THE BENEFIT OF THE NATIVES:

If this area is not reserved white trappers will continue to fly into the territory and with the very best of equipment available, they will be able to diminish the fur to a point where it will be impossible for the Natives to subsist. There appears to be very little likelihood that any appreciable number of whites will occupy the territory within the next 50 years. There is however within the area forests that might be utilized when the lumber supply becomes exhausted in the Southeastern part of Alaska. There are no known coal or other minerals that are found in paying quantities within the area. And, since this area lies north of the Arctic Circle there is a very small possibility that it will ever be developed from an agricultural standpoint.

[Exhibit 18]

Venetie, Alaska
December 30, 1939

Mr. Clyde G. Sherman
Office of Indian Affairs
Field Service
Nome, Alaska.

Dear Mr. Sherman:—

The Chief of Venetie, John Frank, made a special trip to the Arctic Village country to get signatures for the proposed reservation. The Chief was gone about two weeks, had hard trail and he often had to camp out in the open. And did succeed in getting most of the signatures. All he saw signed, but a few were so far away that he could not reach them. The people of Arctic Village and Christian Village move back and forth so much that it is difficult to place them. At present they are camping a half way between the two places.

But Kachick and Venetie have all signed up.

With all good wishes,

Sincerely,

(Sgd) John Fredson

[Exhibit 20]

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS

CONSTITUTION AND BY-LAWS
OF THE
NATIVE VILLAGE OF VENETIE
ALASKA

RATIFIED JANUARY 25, 1940

[SEAL]

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON: 1940

CONSTITUTION AND BY-LAWS OF THE NATIVE VILLAGE OF VENETIE

We, a group of Indians having the common bond of living together in the Village of Venetie, Territory of Alaska, in order to have better life and greater security, make for ourselves this Constitution and By-laws, by authority of the Act of Congress of June 18, 1934, as amended by the Acts of June 15, 1935 and May 1, 1936.

ARTICLE I—NAME

This organization shall be called the "Native Village of Venetie."

ARTICLE II—MEMBERSHIP

SECTION 1. *First Members.*—All persons whose names are on the list of native residents, made according to the Instructions of the Secretary of the Interior for organization in Alaska, shall be members of the Village.

SEC. 2. *Children of Members.*—All children of any members shall be members of the Village.

SEC. 3. *Loss of Membership.*—Any member may willingly give up his membership, or his membership may be taken away for good reason by the Village, or if he moves away from the Village, intending not to return, he shall lose his membership.

SEC. 4. *New Membership.*—Any person who has lost his membership and any other native person may be made a member if he sets up a home in the Village.

SEC. 5. *Membership Rules.*—The Village may make rules to govern membership, either for the purpose of carrying out this Article or covering membership matters not taken care of in this Article.

ARTICLE III—GOVERNING BODY

SECTION 1. *Choice of Governing Body.*—At a general meeting following the acceptance of this Constitution, the Village membership shall decide what kind of governing body it wishes to set up to speak and act for the Village and to use the powers of the Village. If there is a governing body already set up in the Village, at the time this Constitution is accepted, the membership may decide to keep that governing body, or it may choose a new form of government.

SEC. 2. *Choice of Officers.*—The Village shall at the same time decide how members and officers of the governing body shall be chosen and how long they shall serve. The Village shall then choose the members to serve on the governing body and such officers as may be thought necessary.

SEC. 3. *Meetings of Membership and Governing Body.*—The Village shall decide when and how often there should be meetings of the whole Village membership as well as of the governing body; also it shall decide what notice shall be given for the calling of meetings and how many members must be present at such meetings in order to do business; and it may make any other rules necessary for the holding of meetings. A general meeting of the whole membership shall be held at least once a year.

SEC. 4. *Record and Report of Village Decisions.*—A record shall be made and kept of all the rules made under sections 1, 2, and 3 of this Article, which record shall be called the Record of Organization of the Native Village of Venetie. Copies of this record shall be given to the teacher or other representative of the Office of Indian Affairs serving the Village. There shall be put in the record the names of all persons chosen to be officers of the Village.

ARTICLE IV—POWERS OF THE VILLAGE

SECTION 1. *Powers Held.*—The Village shall have the following powers:

To do all things for the common good which it has done or has had the right to do in the past and which are not against Federal law and such Territorial law as may apply.

To deal with the Federal and Territorial Governments on matters which interest the Village, to stop any giving or taking away of Village lands or other property without its consent, and to get legal aid, as set forth in the act of June 18, 1934.

To control the use by members or nonmembers of any reserve set aside by the Federal Government for the Village and to keep order in the reserve.

To guard and to foster native life, arts and possessions and native customs not against law.

SEC. 2. *Grant of More Powers.*—The Village may have and use such other powers as may be given to it by the Federal or Territorial Government.

SEC. 3. *Use of Powers.*—The governing body shall put into use such of the powers of the Village as the Village may give to it at general meetings of the membership and shall make reports of its actions to the membership at general meetings.

SEC. 4. *Rule-making Power.*—The Village may make rules which are not against law to carry out the words of this Constitution.

ARTICLE V—RIGHTS OF MEMBERS

SECTION 1. *Right to Vote.*—All members of the Village 21 years of age or over shall have the right to vote in Village meetings and elections.

SEC. 2. *Right to Speak and Meet Freely.*—Members of the Village shall have the right to speak and meet together freely in a peaceable way.

SEC. 3. *Right to Share in Benefits.*—Members of the Village shall have equal chance to share in the benefits of the Village.

ARTICLE VI—CHANGES IN THE CONSTITUTION

Changes in this Constitution and By-laws may be made if the changes are approved by the Secretary of the Interior and by a majority vote of the Village members voting in an election called by the Secretary of the Interior at which at least 30 percent of the voting membership take part.

BY-LAWS OF THE NATIVE VILLAGE OF VENETIE

ARTICLE I—OFFICERS AND THEIR DUTIES

SECTION 1. *Village Records.*—The Village or the governing body shall choose one or more members who shall have the duty of keeping records of all actions and decisions of the Village and of the governing body and of giving copies of the records to the representatives of the Office of Indian Affairs serving the Village.

SEC. 2. *Village Funds.*—The Village or the governing body shall choose one or more members who shall have the duty of caring for the Village funds and keeping records of all funds taken in and paid out and giving copies of the records to the representative of the Office of Indian Affairs.

SEC. 3. *Officers and Agents.*—The Village or the governing body may choose as many officers and agents as it may need to carry out its duties and shall state the length of service and the duties of each officer or agent when he is chosen.

ARTICLE II—ADOPTION

This Constitution and By-Laws shall be in effect when it is agreed to by a majority vote of the Village members voting in an election called for the purpose by the Secretary of the Interior: *Provided*, That at least 30 percent of the voting membership take part. The persons entitled to vote are all the adult native residents in the Village of Venetie.

APPROVAL

This Constitution and By-laws is hereby approved by the Assistant Secretary of the Interior and submitted for acceptance or rejection by the group of Indians having a common bond of living together in the Village of Venetie, Alaska, in an election called and held under the Instructions of the Secretary of the Interior.

All rules and regulations heretofore promulgated by the Interior Department or by the Office of Indian Affairs, so far as they may be incompatible with any of the provisions of the said constitution and by-laws will be inapplicable to the Village of Venetie, Territory of Alaska, from and after the date of adoption of this constitution.

All officers and employees of the Interior Department are ordered to abide by the provisions of the said constitution and by-laws.

OSCAR L. CHAPMAN,
Assistant Secretary of the Interior.
[SEAL]

WASHINGTON, D. C., *May 15, 1939.*

CERTIFICATION OF ADOPTION

Pursuant to an order, approved May 15, 1939, by the Assistant Secretary of the Interior, the attached constitution and by-laws was submitted for ratification to the group of Indians having a common bond of residence in the Village of Venetie, Territory of Alaska, and was on January 25, 1940 duly ratified by a vote of 30 for and none against in an election in which over 30 percent of those entitled to vote cast their ballots, in accordance with section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 373).

JOHN FRANK,
Chairman, Election Board.

JOHN FREDSON,
Government Representative.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS

CORPORATE CHARTER OF THE NATIVE VILLAGE OF VENETIE ALASKA

Ratified January 25, 1940

CORPORATE CHARTER OF THE NATIVE VILLAGE OF VENETIE

A Federal Corporation Chartered Under the Act of June 18, 1934, as Amended by the Act of May 1, 1936

Whereas, a group of Indians having a common bond of living together in Venetie, Territory of Alaska, seek to organize under sections 16 and 17 of the Act of June 18, 1934, and section 1 of the Act of May 1, 1936, by adoption of a constitution and by-laws and a charter approved by the Secretary of the Interior.

Now, therefore, I, Oscar L. Chapman, Assistant Secretary of the Interior, by virtue of the authority given to me by the above acts, do hereby submit this charter of incorporation to the group of Indians so organizing.

SECTION 1. *Purpose and Name.*—In order to enable the Village and its members to do various kinds of business for their good, the Village is hereby chartered as a corporation of the United States of America under the name of "Native Village of Venetie."

SEC. 2. *Membership.*—The corporation shall be a membership corporation, consisting of all persons of the

Village considered members under the rules of its constitution.

SEC. 3. *Management.*—The corporation shall be managed by the governing body set up under the constitution.

SEC. 4. *Powers.*—The corporation shall have the power to do the following things:

To own, hold, manage and dispose of all Village property;

To make contracts;

To sue and be sued;

To borrow money from the revolving Indian credit fund and to use it under a loan contract;

To enter into any business or activity that will better the condition of the Village and its members;

To do such other things as may be necessary to carry on the business and activities of the Village.

SEC. 5. *Limits to Powers.*—In using its powers the corporation must not do the following things:

Go against any law or the constitution and by-laws of the Village;

Sell or mortgage any land set aside as a reserve for the Village;

Make leases, permits or contracts covering any lands or waters set aside as a reserve for the Village without the approval of the Secretary of the Interior or his authorized representative.

SEC. 6. *Property of Members.*—Property owned by a member of the Village shall not be taken to pay the debts of the corporation without his consent.

SEC. 7. *Records*—The corporation shall keep correct records of its business and activities and give copies of

these records when asked to do so to the representative of the Office of Indian Affairs serving the Village.

SEC. 8. *Changes in the Charter.*—Changes in the charter may be made by the Village and if approved by the Secretary of the Interior shall be in force when agreed to by a majority vote of those members voting in an election called by the Secretary of the Interior: *Provided,* That at least 30 percent of the voting membership votes. The charter itself shall continue in force for all time, unless taken away by act of Congress.

SEC. 9. *Adoption of Charter.*—This charter shall be in force when it is agreed to by a majority vote of those members voting in an election called by the Secretary of the Interior: *Provided,* That at least 30 percent of the voting membership votes and provided that the Village has agreed to a constitution and by-laws approved by the Secretary of the Interior.

This Charter is hereby approved and submitted to the group of Indians having a common bond of residence in the Village of Venetie, Alaska, to be voted on in an election called and held under the Instructions of the Secretary of the Interior. The Charter shall be deemed issued when a petition for a Charter, signed by one-third of the adult Indians, has been received by an authorized representative of the Department of the Interior.

OSCAR L. CHAPMAN,
Assistant Secretary of the Interior.

[SEAL]

WASHINGTON, D. C., *May 15, 1939.*

CERTIFICATION

Pursuant to an order, approved May 15, 1939 by the Assistant Secretary of the Interior, the attached charter was submitted for ratification to the group of Indians having a common bond of residence in the Village of Venetie, Territory of Alaska, and was on January 25, 1940 duly ratified by a vote of 30 for and none against, in an election in which over 30 percent of those entitled to vote cast their ballots, in accordance with the Alaska Act of May 1, 1936 (49 Stat. 1250), and section 17 of the Act of June 18, 1934 (48 Stat. 934), as amended by the Act of June 15, 1935 (49 Stat. 373).

JOHN FRANK,
Chairman, Election Board.

JOHN FREDSON,
Government Representative.

[Exhibit 25]

May 20, 1943

UNITED STATES
DEPARTMENTOF THE INTERIOR
WASHINGTON

MEMORANDUM for the Commissioner,
Office of Indian Affairs
Director, Fish and Wildlife Service

I have, this day, signed proclamations setting aside certain lands and waters in Alaska as Indian Reservations under section 2 of the Act of May 1, 1938 (49 Stat. 1250). These include land and water areas in the vicinity of White Mountain Village in Horton Sound; Artis Village north of the Yukon River; Akutan and including the entire island of Akun; and Shishmarof on the north side of Seward Peninsula including the island of Sarichef. Establishment of these and like reservations in no sense diminishes the regulatory power of the United States with respect to the fish and wildlife resources on the areas embraced therein. In order to preserve and develop such resources in reservations established under section 2 of the Act of May 1, 1936 it is my desire that the Fish and Wildlife Service and the Indian Service shall work in closest cooperation, and that they shall prepare for my approval an agreement of understanding on how best to effectuate the administration of this joint responsibility.

(Sgd.) OSCAR L. CHAPMAN
Assistant Secretary

[Exhibit 26]

May 20, 1943

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON

MEMORANDUM for the Assistant Secretary.

In compliance with your memorandum of May 7 I have had the five proposed orders designating lands in Alaska as Indian reservations under the act of May 1, 1936 (49 Stat. 1250, 48 U. S. C. sec. 358a), rewritten to include the mineral rights within the reservations.

The four orders prepared for your signature should be returned to the Office of Indian Affairs after you have signed them so that they may be certified and transmitted to the Director of the Division of the Federal Register. The public land order designating the lands and water surrounding the village of Karluk on Kodiak Island should be returned to the General Land Office after it has been signed by the Secretary so that it too may be certified and transmitted to the Federal Register, as required by 1 CFR 2.3.

If you and the Secretary will return these orders to my office after they have been signed, I will return them to the bureaus for certification.

Enclosure 2929443

/s/ Illegible
Solicitor.

[Exhibit 27]

RETYPED

PROCLAMATION DESIGNATING AN INDIAN RESERVATION FOR THE INHABITANTS OF THE NATIVE VILLAGES OF VENETIE, ARCTIC VILLAGE, CHRISTIAN VILLAGE, AND ROBERT'S FISH CAMP (KACHICK). ALASKA

Pursuant to authority vested in the Secretary of the Interior by section 2 of the act of May 1, 1936, 49 Stat. 1250 (U.S.C., title 48, sec. 358a), there is hereby designated as an Indian Reservation for the use and occupancy of the native inhabitants of the villages of Venetie, Arctic Village, Christian Village, and Robert's Fish Camp (Kachick) and vicinity, Alaska, the following area:

Beginning at the center of the upper mouth of the Chandalar River at the point where it enters the main channel of the Yukon River (known locally as Venetie Landing) and following the contour of the main channel meanders of the Chandalar River in a general northeasterly direction to the mouth of East Fork of Chandalar River; thence following contour of the channel meanders of the East Fork in a general north and east direction to the intersection of East Fork with Tritt Crook (known locally as Vuny-chojik); thence east and north following mid-channel meanders of Tritt Creek to its intersection with 145° 30′ West longitude (a point approximately 12 miles east and 2 miles north of Arctic Village); thence due south following 145° 30′ West longitude to intersection with Otter Creek (a point approximately 6 miles northeast of Simon's Cabin); thence west and south to Christian River; thence in general southerly direction following midstream meanders of Christian River to point of intersection with Cutoff Slough; thence south and east to back Yukon Slough; thence

west to main channel of Yukon River; thence following northern bank downstream in westery direction to Venetie Landing and point of beginning.

The area described aggregates 1,408,000 acres.

This order shall be subject to any valid existing rights or claims acquired prior to the date hereof and shall become effective only upon its approval by a majority vote of the natives residing in the above-described area, voting in the manner proscribed by the said section 2 the act of May 1, 1936, *supra.*

Done in the city of Washington, D.C., this 20 day of May, 1943.

(Signed Oscar L. Chapman)

Assistant Secretary of Interior

[Exhibit 28]

RETYPED

In Reply refer to:
O&O-RLW

Juneau, Alaska
July 23, 1943

AIRMAIL

Mr. John Fredson
U.S. Government Teacher
Venetie, Alaska—via Fort Yukon

Dear Mr. Fredson:

The Commissioner of Indian Affairs mailed us a copy of "Proclamation Designating an Indian Reservation for the Inhabitants of the Native Villages of Venetie, Artic Village, Christian Village, and Robert's Fish Camp (Kachick), Alaska", stating that *the Proclamation shall become effective only when its approval by a majority vote of the natives residing in the area, voting in the manner proscribed by section 2 of the act of May 1, 1936 (49 Stat. 1260),* and that action shall be taken to obtain an election by the natives. Three copies of the Proclamation are enclosed.

For your information we are enclosing a copy of "Composite Indian Reorganization Act for Alaska, Alaskan Amendment of May 1st, 1936". Please note that in order for the Reservation to become effective a special election must be duly called by the Secretary of the Interior upon 30 days notice.

We are enclosing a sample ballot for your guidance and use in voting on the proclamation at the time the election is held. You should prepare a sufficient number for your use. Also enclosed is the original and five copies of "Certification of Adoption" for completition as soon as results of the election are known. Please mail us the original and two copies.

Upon receipt of this letter will you please discuss the matter with the Village Council and *give us as soon as possible a proposed election date which you recommend as the most suitable time, such date being not less than 90 days from the time you wire me.* We will then advise the Commissioner at once of your desire, recommending that the Secretary call the election within the time so requested by you.

Sincerely yours,

Claude M. Hirst
General Superintendent

Enclosures
——:mjsp

[Exhibit 29]

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON

Nov. 25, 1943

Mr. Claude M. Hirst
Gen. Supt., Alaska (Indian Service)

Dear Mr. Hirst:

Reference is made to the proclamation of May 20, 1943, issued pursuant to Section 2 of the Alaska Act of May 1, 1936 (49 Stat. 1250), designating certain lands as an Indian reservation for the use and benefit of the native inhabitants of the village of Venetie, Arctic Village, Christian Village, and Robert's Fish Camp (Kachick) and vicinity, Alaska. The proclamation shall become effective only upon its approval by a majority vote of the natives residing in the area described therein.

By letter of October 14, you recommended that an election date be called on March 1, 1944. Therefore, under authority of Section 2 of the Act of May 1, 1936, supra, and in accordance with your recommendation, an election is hereby called for the purpose of enabling the native inhabitants of the above mentioned villages and vicinity to vote on the approval of the said proclamation of May 20, 1943. The election shall be held on March 1, 1944, and shall be conducted in accordance with the requirements of Section 2 of the said Act of May 1, 1936. A copy of the ballot used in the election and a certificate executed by the proper officials certifying as to the date and the results of such election should be submitted for the records of the Indian Office.

Sincerely yours,

/s/ Oscar L. Chapman
OSCAR L. CHAPMAN
Assistant Secretary

cc: Washington Office

[SEAL]

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

Sep. 20, 1978

Mr. Donald R. Wright, Agent
Native Village of Venetie
Tribal Government
Star Route Box 10402
Fairbanks, Alaska 99701

Dear Mr. Wright:

Secretary Andrus has asked me to respond to your letter to him of August 8, 1978.

I have enclosed a memorandum from the Associate Solicitor, Division of Indian Affairs, to the Assistant Secretary for Indian Affairs which is relevant to some of the questions you raise in your letter. As you will note, the memorandum concludes that the Secretary has no authority to restore the former Venetie Reserve to trust status.

I am aware of the delays that have occured in the actual conveyance of the lands, and I assure you that we are making every effort to complete the conveyance as soon as possible. Until the actual conveyance, however, it is clear that the regulations found at 43 C.F.R. § 2650.1 (a)(1), setting forth provisions for interim administration, apply to the former Venetie Reserve. *See* 43 C.F.R. § 2654.3(a). Section 2650.1(a)(1) provides:

> Prior to any conveyance under the act, all public lands withdrawn pursuant to sections 11, 14, and 16, *or covered by 19 of the act,* shall be administered under applicable laws and regulations by the Secretary of the Interior, or by the Secretary of Agriculture in the case of national forest lands, as provided by section 22(i) of the act. The authority of the

> Secretary of the Interior and of the Secretary of Agriculture to make contracts and to issue leases, permits, rights-of-way, or easements is not impaired by the withdrawals. (Emphasis supplied.)

The Secretarial authority set forth above is exercised by the Bureau of Land Management. Of course, in the exercise of such authority, it is necessary that:

> Prior to making contracts, or issuing leases, permits, rights-of-way, or easements on lands subject to election pursuant to section 19(b) of the act, the Secretary shall obtain the consent of the representatives of the Natives living on those lands. 43 C.F.R. § 2650.1(a)(2)(ii)

In view of the above, I do not see that a meeting with the Secretary would serve any useful purpose. Under the present circumstances, the Secretary simply does not have the authority to ignore the policy and statutory provisions of the Alaska Native Claims Settlement Act and restore the former Venetie Reserve to trust status, or to waive valid Departmental regulations and exempt Venetie from regulations which clearly apply to Venetie lands. It would appear that Departmental responsibilities with respect to former trust land can only be restored through legislation. This is an avenue you may wish to pursue. Should you generate a legislative proposal on this matter, the Secretary, I, or one of our representatives will be happy to discuss the proposal with you at some future date.

Sincerely,

/s/ [sgd]
Solicitor

[Retyped]

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

MEMORANDUM

To: Assistant Secretary—Indian Affairs

From: Associate Solicitor, Indian Affairs

Subject: Trust land for the Natives of Venetie and Arctic Village

This is in response to the memorandum of the Deputy Assistant Secretary for Administration, dated December 13, 1977, requesting reconsideration of the position taken by former Under Secretary Kent Frizzell that the Alaska Native Claims Settlement Act (ANCSA) precludes the Secretary from restoring land held in fee by Alaska Natives to trust status pursuant to Section 5 of the Indian Reorganization Act (IRA). Our research reaffirms the conclusion of the former Under Secretary. We further believe that there is no basis for distinguishing, for purposes of Section 5, former reservation land patented pursuant to Section 19(b) of ANCSA from any other land conveyed to Natives pursuant to ANCSA.

The intent of Congress to permanently remove all Native lands in Alaska from trust status is unmistakable. The declaration of policy states that "the settlement should be accomplished . . . without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges . . . ." 43 U.S.C. § 1481(b).

In analyzing the declaration of policy, the Senate Report stated: "A major purpose of this committee and the Congress is to avoid perpetuating in Alaska the reservation and the trustee system." S. Rep. No. 405, 92th

Cong., 1st Sess. (1971) at 108. This theme was oft repeated in the floor debates. *See* examples cited in Appendix.

The Natives of Venetie and Arctic Village elected, pursuant to Section 19(b), to take their former reservation in fee. They argue that they thereby disassociated themselves from the settlement legislation and that interpretations based upon the act as a whole should not apply to them. This argument misconstrues the nature of Section 19(b). While a vote to take a former reservation in fee renders the Natives ineligible for the land and monetary benefits generally provided for elsewhere in ANCSA, it is incorrect to say that the vote disassociates them from the settlement. ANCSA was a settlement of all Native claims. It includes Natives on and off reservations. This point may be demonstrated by comparing the treatment of the Metlakatlans of the Annette Island Reserve with Natives of all other reservations. The Metlakatlans are the sole group of Natives not included within the settlement since they are of Canadian origin and thus have no aboriginal claims to settle. In contrast to other reservation Natives, the Metlakatlans have no village corporation under ANCSA, and their reservation was not revoked.

The option contained in Section 19(b) was not designed to allow "reservation Natives" to disassociate themselves from the settlement. Rather, it was designed to avoid the hardship which would result if these Natives were forced to select land elsewhere, or a lesser total acreage. S. Rep. No. 405, 92d Cong., 1st Sess. (1971) at 159.

The structure and legislative history of Section 19 itself precludes the restoration of former reservations to trust status. Section 19 revokes all reservations (except for Metlakatla) and directs that the land be conveyed to the ANCSA village corporation, not to the IRA entities. It does not allow Natives to vote for continued trust status. It merely allows them to choose between two

forms of compensation in settlement of their claims. It is clear from alternatives to Section 19 in earlier proposed settlement legislation that Congress did not exclude the alternative of continued trust status by oversight. Section 22, the counterpart in S. 35 to Section 10, would have allowed the Metlakatlans the choice between continued trust status and fee ownership. Even more telling is the fact that the Councils of Venetie and Arctic Village proposed an amendment to Section 15 of H.R. 10193 (an earlier version of Section 19) which would have permitted the retention of trust status. The proposal was never incorporated into ANCSA. Resolution No. 69-3, Combined Councils of the Native Village of Venetie and Arctic Village Native Council, June 11, 1969.

Also significant is the repeal in Section 704(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743, of Section 2 of the Act of May 1, 1936, 49 Stat. 1250, 25 U.S.C. § 496, which extended the provisions of the Indian Reorganization Act to Alaska and gave the Secretary the authority to designate certain lands in Alaska as Indian reservations. In view of the clear legislative intent and policy expressed in ANCSA's extensive legislative history, it would, in my opinion, be an abuse of the Secretary's discretion to attempt to use Section 5 of the IRA (which, along with §§ 1, 7, 8, 15, and 17 of the IRA still apply to Alaska pursuant to the unrepealed portion of the Act of May 1, 1936) to restore the former Venetie Reserve to trust status.

We have reviewed the materials received by the Chief of the Branch of Tribal Government Relations in support of the petition for the restoration of trust status. These materials concern the advisability of a restoration of trust status and set out the provisions of the IRA. There is nothing in these materials which counters our analysis of ANCSA. There is only a vague suggestion in the letter from Donald Wright to former Commissioner of Indian Affairs Thompson, dated August 13, 1976, that the Natives believed that they could retain the reservation in trust when they voted pursuant to Section 19 to take the reservation in fee. Nothing else in the materials supports or belies this suggestion. At any rate, a finding that the Natives were uninformed in no way affects the inability of the Secretary as a matter of law to restore the reservation to trust status. Even assuming the Natives could establish that they were uninformed, or worse, actively misled, it does not follow that the remedy would be to return the land to reservation, trust status. At most, the Natives would be entitled to another vote, such as the opt-in, opt-out election ordered by the court following the establishment of the 13th Region, between fee status and normal ANCSA benefits. The Natives do not seem to be requesting a such second vote, and we are not sure that a second vote would be possible at this time absent a court order.

In conclusion, Congress intended permanently to remove from trust status all Native land in Alaska except allotments and the Annette Island Reserve. Section 19(b) allows the Natives of former reservations to choose between two forms of compensation, but does not allow them to disassociate themselves from the settlement. Finally, even if the Natives could disassociate themselves from the settlement, Section 19 itself and its legislative history preclude the restoration of trust status.

/s/ Thomas W. Fredericks
THOMAS W. FREDERICKS

APPENDIX

Statements Regarding Reservations Made During ANCSA Debates

Rep. Kyl: I do not know of any member of the committee who wanted anything to do with setting up a reservation system in the State of Alaska similar to that which we have in the lower 48 states. Our experience with reservations has just been so tragic and has resulted in such a futile paternalistic system that we wanted to avoid that completely. 117 Cong. Rec. 36856 (1971).

Rep. Meeds: Every one of the bills in our committee and the bills in the other body, all of them, eschew the reservation or trust concept. For far too long we in America have been making the Natives' mistakes for them. 117 Cong. Rec. 36865 (1971).

Sen. McGovern: Those who are concerned about creating new Indian reservations in Alaska can find a solution to this problem by assuring an opportunity for the Natives to secure productive and promising lands. 117 Cong. Rec. 38444 (1971).

Sen. Gravel: Under the committee bill all reservations in Alaska are revoked, unless the village corporations located within the reservation elect to take fee title to the reservation. If Natives do elect to take title to the reservation, they will not participate in the land selection procedures of the bill nor share in the monetary settlement. 117 Cong. Rec. 46967 (1971).

[SEAL]

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

Dec. 23, 1980

John E. Rougeot, President
Rougeot Oil and Gas Corporation
7030 South Yale, Suite 401
Tulsa, Oklahoma 74136

Mr. Paul S. Williams
First Chief, Native Village of Venetie
Venetie, Alaska 98781

Gentlemen:

This is in partial response to an inquiry of September 11, 1980, by counsel for the Native Village of Venetie and Rougeot Oil and Gas Corporation addressed to the Superintendent of the Bureau of Indian Affairs, Fairbanks, relating to Secretarial approval of certain oil and gas leases. Your inquiries were forwarded by the Bureau of Indian Affairs to us for response.

You have posed several complex questions which give rise to a variety of issues, some of which are relatively easy and some of which are extremely difficult and ones of first impression for this Department. Since we are aware that the existing agreements contain an option provision which must be exercised by December 31, 1980, we are anxious to provide you with at least our initial response to those questions or parts of questions for which there is a fairly clear answer. We will endeavor to provide you with a complete answer as soon as possible. We believe, however, that even these partial answers should be of help to you.

Our understanding of the facts is that on July 12, 1973, representatives of the Village of Venetie tribal government

incorporated the Village as an Alaska corporation pursuant to Alaska Native Claims Settlement Act of 1971 (ANCSA). Arctic Village followed the same procedures in forming the Neets'ai Corporation. The corporations elected to take the former Venetie Indian Reservation lands, including the mineral estate, in fee pursuant to Section 19(b) of ANCSA.

On September 1, 1979, both Neets'ai Corporation and Venetie Indian Corporation (the ANCSA entities) executed warranty deeds granting all their interests in the reservation lands to the Venetie entities organized under the Indian Reorganization Act (IRA).

On December 17, 1979, the Federal Government issued a patent to the Neets'ai and Venetie Indian Corporations, as tenants in common, for the entire estate comprising the former Venetie Indian Reservation. The patent was issued pursuant to Section 19(b) of ANCSA and was made subject only to valid existing rights.

On September 4, 1980, the Venetie IRA entities leased oil and gas rights on all their lands to Rougeot for a primary term extending through December 31, 1982. The initial lease bonus was set at $1,800,000, of which $200,000 was a previously paid option fee.

Finally, and also on September 4, 1980, the IRA entities, the ANCSA entities and Rougeot entered an "Agreement and Conveyance" which purports to draw the IRA and ANCSA entities together as responsible parties under the oil and gas lease. The document provides that if any of the transactions with Rougeot or between the Native entities are held invalid, the IRA entities would be deemed to have conveyed their interest in the land and minerals back to the ANCSA entities as tenants in common. The Agreement and Conveyance further provides that Rougeot may enforce its rights under the oil and gas lease against any of the Native entities—ANCSA or IRA.

As already indicated, these facts give rise to several complex issues. The membership in ANCSA corporations

and the membership in the Venetie IRA entities are not the same. Accordingly, conveyance by the ANCSA corporations to the IRA entities could constitute the conveyance of all or substantially all of the ANCSA corporations' assets. While there is no evidence in the file on this point, we have no reason to suspect that the ANCSA corporations did not comply fully with the special requirements of Alaska state corporate law relating to shareholder approval of such conveyances. *See* Alaska Statutes § 10.05.435 and 438. We mention this requirement because there is an unresolved problem as to the relationship between the Venetie IRA and members of the traditional community of Arctic Village.

The members of both of these communities have acted in recent years as though they were all members of the Venetie IRA entities. However, the record does not justify such action. The Venetie IRA organization was ratified January 25, 1940. It was not until March 1, 1944, that people from the traditional community of Arctic Village and the Venetie IRA, as well as two other traditional communities (Christian and Robert's Fish Camp (Kachick)), voted to accept the reservation in trust. This later vote did not constitute an amendment of the Venetie IRA constitution or corporation charter but we are fearful it has been construed as such.

The situation in Alaska relating to the Indian Reorganization Act is substantially different than in the lower 48. In the lower 48, the existence of a reservation was a prerequisite to organization under the IRA. In Alaska, communities could organize without first having a reservation and many did so. The result seems to have been substantial confusion.

Our preliminary opinion that the members of the traditional community of Arctic Village are not necessarily the same as the members of the Venetie IRA aggravates the problem of shareholder approval under Alaska state corporate law. However, in light of the agreement and con-

veyance executed by the Natives on September 4, the same date the oil and gas lease was executed, it may not be necessary to address this more complex issue. Pursuant to this agreement and conveyance the ANCSA corporations and the Venetie IRA entity agree that Rougeot Oil and Gas Corporation can enforce any of the lease and conveyance agreements against the two ANCSA corporations even if the lease or conveyance is determined invalid or unenforceable against the Venetie IRA by any person in any administrative procedure for any reason. Thus, we believe that the most important question involved is the relatively simple one of whether there is any requirement for Secretarial approval of an oil and gas lease executed or adopted by the ANCSA corporations. Our answer is that the Secretary clearly does not need to approve any such actions by the ANCSA corporations.

The land transferred to the Venetie/Arctic Village ANCSA entities was the land comprising the Venetie Reservation which was set aside for the inhabitants of the Native Villages of Venetie, Arctic Village, Christian Village, and Robert's Fish Camps (Kachick) and vicinity by a proclamation of the Assistant Secretary on May 20, 1943, pursuant to the Act of May 1, 1936 (49 Stat. 1253). Section 19(a) of ANCSA provides in part:

> Notwithstanding any other provision of law, and except where inconsistent with the provisions of this chapter, the various reserves set aside by legislation or by Executive Order or Secretarial Order for Native use or for administration of Native affairs . . . are hereby revoked. See 43 U.S.C. § 1618(a).

The Government's conveyance of former Venetie Reserve lands to the ANCSA entities in fee was a conveyance to Village Corporations, not to tribes. The Settlement Act section under which the patent was issued provides that:

> Notwithstanding any other provision of law or of this chapter, any Village Corporation or Corporations may elect . . . to acquire title to the surface

> and subsurface estates in any reserve set aside for the use or benefit of its stockholders or members prior to December 18, 1971 . . . . In such event, the Secretary shall convey the land to the Village Corporation or Corporations . . . . 43 U.S.C. § 1618(b).

Not only is this statutory language revoking the reservation status of the land clear, but also ANCSA's declaration of policy and legislative history demonstrates that Congress intended to remove Alaska Native lands from a tribal or racially defined status and therefore free of any restraints on alienation. Congress' declaration of policy in the Settlement Act provides that:

> The settlement should be accomplished . . . without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges . . . . 43 U.S.C. § 1601(b).

The House report on the Settlement Act declared that:

> [t]he bill does not establish any trust relationship between the Federal Government and the Natives. The regional corporations and the village corporations will be organized under State law, and will not be subject to Federal supervision except to the limited extent specifically provided in the bill. All conveyances of land will be in fee—not in trust. H.R. Rep. No. 92-523, 92d Cong., 1st Sess. 9 (1971).

The Senate Report is also instructive:

> The assets granted to Alaska Natives under the terms of this settlement will be managed and *disposed of by them* either as individuals or through statewide, regional and local corporations *controlled by them.*
>
> * * * *

> The settlement of Alaska Native land claims is to be final and complete and the present legislation intends to avoid prolonged legal or property distinctions or implications of wardship based upon race. Accordingly, the assets granted in settlement of the claims will be, or will rapidly become, ordinary and unrestricted forms of property. Organizations established to implement the settlement will have a strictly limited life or will become ordinary public and private corporations operating without any special privileges or restrictions. [Emphasis added.] S. Rep. No. 92-405, 92d Cong., 1st Sess. 80 (1971).

Although there is very little case law on the issue, what there is agrees with the committee's interpretation of the Settlement Act. *See Cape Fox Corp. v. United States*, 456 F. Supp. 784 (D. Ak. 1978). Furthermore, other sections of the Settlement Act reflect Congress' consent to unrestricted Native alienation of land and natural resources patented pursuant to the Settlement Act. For example, in the definition of "Village Corporation" in section 3(j) of the Settlement Act, 43 U.S.C. § 1602(j), the consent to alienation is clear:

> "Village Corporation" means an Alaska Native Village Corporation organized under the laws of the State of Alaska as a business for profit or nonprofit Corporation *to hold, invest, manage and/or distribute lands,* property, funds, and other rights and assets for and on behalf of the Native Village in accordance with the terms of this chapter. [Emphasis added.]

The laws of Alaska obviously allow corporations to alienate property freely. Similarly, Section 14(g) of the Settlement Act provides that:

> [u]pon issuance of the patent, the patentee shall succeed and become entitled to any and all interests of the State or the United States as lessor, contractor, permitter, or grantor, in any such leases, contracts,

> permit, rights-of-way, or easements covering the estate patented . . . .

This section substitutes the Village Corporation for the United States or the State, as the case may be, as grantor or lessor of pre-existing interests in the patented land. S. Rep. No. 92-405, 92d Cong., 1st Sess. 145 (1971). It follows that subsequent conveyances of interests in the patented land would be executed by the Native Corporations, not by the Federal or State Governments. Again, the conclusion is that Congress has consented in the Settlement Act to unrestricted Native alienation of ANCSA patented lands.

For all of the foregoing reasons, I am convinced that Secretarial approval is not required for any actions taken by the ANCSA corporate entities. Our preliminary view is that Secretarial approval is also not required of actions taken by Venetie tribal government under these unique circumstances. The issues surrounding the actions by the Venetie tribal government are, however, considerably more complex. We will provide you with our views on those issues just as soon as we have finalized them. In the meantime, if you have any other questions, please don't hesitate to call on us.

Sincerely yours,

/s/ Scott Keep
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Acting Associate Solicitor
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Supreme Court, U.S.
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No. 96-1577

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STATE OF ALASKA,
Petitioner,

v.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

Forty-four million acres of Alaska land were conveyed to state-chartered, Native-owned corporations pursuant to the Alaska Native Claims Settlement Act of 1971 ("ANCSA" or "Act"). The respondent Native Village owns a 1.8 million-acre expanse of ANCSA land located in north-central Alaska. The Ninth Circuit held that this land is "Indian country" within the meaning of 18 U.S.C. § 1151(b), making respondent sovereign over a piece of Alaska about the size of the State of Delaware, overturning a fundamental jurisdictional premise upon which Alaska has been governed for more than a century, and rendering uncertain the jurisdiction of the State and the more than 225 Native villages occupying ANCSA land to govern vast areas of Alaska. The questions presented are:

1. Whether the Ninth Circuit correctly held—in conflict with the clear intent of Congress in enacting ANCSA, the decisions of the Alaska Supreme Court, and the interpretation of the federal agency charged with implementing ANCSA—that ANCSA land may constitute Indian country within Section 1151(b).

2. If so, whether the Ninth Circuit correctly held—in conflict with the decisions of this Court and other federal circuits—that the determination whether land is Indian country within Section 1151(b) should depend upon an *ad hoc*, six-part balancing test incapable of producing predictable results.

PARTIES TO THE PROCEEDINGS

Petitioner, plaintiff-appellee below, is the State of Alaska. It brought this action on its own behalf and on behalf of Yukon Flats School District, Unalakleet/Neeser Construction JV, Unalakleet Native Corporation, Neeser Construction Company, and Gerald Neeser. Yukon Flats School District is organized under state law, Alaska Stat. § 14.08.031, and administers public schools in north-central Alaska. The other entities are the joint venture, along with its principals, which contracted with the school district to construct a public school facility in Venetie. Under the contract the State assumed liability for taxes levied in connection with the project by an entity other than the State, federal government, or state municipality. *See* J.A. 11-12, 14.

Respondents, defendants-appellants below, are the Native Village of Venetie Tribal Government, the Venetie Tax Court, the Venetie Tax Commission, Gideon James, Lawrence Roberts, Larry Williams, Ernest Erick, Lincoln Tritt, John Titus, and David Case. The individuals are tribal officers or members of the tax court or tax commission, who claim authority to collect the taxes at issue or to enforce them through judicial proceedings. They are sued in both their individual and official capacities. *See id.* 12-13. We refer to respondents collectively as the "Native Village of Venetie" or "Village."

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Oklahoma Tax Comm'n v. *Sac & Fox Nation*, 508 U.S. 114 (1993)	18, 36
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Pittsburg & Midway Coal Mining Co. v. *Watchman*, 52 F.3d 1531 (10th Cir. 1995)	20
Rosebud Sioux Tribe v. *Kneip*, 430 U.S. 584 (1977)	19
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United States v. *Kagama*, 118 U.S. 375 (1886)	4

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United States v. *Levesque*, 681 F.2d 75 (1st Cir.), *cert. denied*, 459 U.S. 1089 (1982)	20
United States v. *Libby, McNeil & Libby*, 107 F. Supp. 697 (D. Alaska 1952)	5
United States v. *McGowan*, 302 U.S. 535 (1938)	*passim*
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H.R. Rep. No. 92-523 (1971)	30, 40, 42, 48
S. Rep. No. 91-925 (1970)	30, 36, 40
S. Conf. Rep. No. 92-581 (1971)	30
S. Rep. No. 92-405 (1971)	30, 40
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117 Cong. Rec. 36865 (Oct. 19, 1971)	30

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Alaska Native Land Claims: Hearing on H.R. 11213, H.R. 15049, and H.R. 17129 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 90th Cong., 2d Sess. (1968)	29
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Alaska Native Land Claims: Hearings on H.R. 13142 and H.R. 10193 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 91st Cong., 1st Sess. (1969)	9, 28, 29, 41
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45 Fed. Reg. 62034 (Sept. 18, 1980)	32

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Dep't of the Interior, *Governmental Jurisdiction of Alaska Native Villages Over Land and Non-members*, Sol. Op. M-36975 (Jan. 11, 1993)	*passim*
Dep't of the Interior, *Opinion Regarding Legal Status of Alaska Natives*, 19 Pub. Lands Dec. 323 (1894)	7
Letter from S. Keep, Acting Assoc. Solicitor, DOI, to P. Williams, First Chief, Native Village of Venetie, *et al.* (Dec. 23, 1980)	38
Letter from R. Ernst, Asst. Sec'y, DOI, to Hon. E. Celler (Feb. 25, 1958), *reprinted in* S. Rep. No. 85-1872 (1958)	7

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Letter from R. Wilbur, Sec'y, DOI, to Hon. E. Howard (Mar. 14, 1932), *reprinted in Authorizing the Tlingit and Haida Indians to Bring Suit in the United States Court of Claims: Hearings on S. 1196 Before the Senate Comm. on Indian Affairs*, 72d Cong., 1st Sess. (1932) 7
Memorandum of C. Westwood, Asst. Solicitor, DOI (Apr. 7, 1958) 22
Report of the Governor's Task Force on Federal-State-Tribal Relations (Feb. 14, 1986) 5, 6, 7, 10

OTHER AUTHORITIES:

Robert D. Arnold, *Alaska Native Land Claims* (1975) 3, 4, 5
Thomas R. Berger, *Village Journey: The Report of the Alaska Native Review Commission* (1995 ed.) 10, 37, 48
Felix S. Cohen, *Handbook of Federal Indian Law* (1982 ed.) .....*passim*
Dep't of the Interior, *American Indian Today* (3d ed. 1991) 19
Federal Field Committee for Development Planning in Alaska, *Alaska Natives and the Land* (1968) 41
Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947).... 23
Ernest Gruening, *The State of Alaska* (1954)..... 5
Lyman E. Knapp, *A Study Upon the Legal and Political Status of the Natives of Alaska*, 39 Am. L. Reg. 325 (1891) 7
Land Baron Publicity-Shy Mississippian Has Lock on Anchorage Lots, Anchorage Daily News, June 30, 1991 37
James E. Lobsenz, *"Dependent Indian Communities": A Search for a Twentieth Century Definition*, 24 Ariz. L. Rev. 1 (1982) 23
Donald C. Mitchell, *Sold American: The Story of Alaska Natives and Their Land, 1867-1959* (1997) 5, 7

TABLE OF AUTHORITIES—Continued

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Heather Noble, *Tribal Powers to Regulate Hunting in Alaska*, 4 Alaska L. Rev. 223 (1987)..... 23
Spill Trustees OK $89 Million Kodiak Deals, Anchorage Daily News, Nov. 4, 1994 37

IN THE

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OCTOBER TERM, 1997

No. 96-1577

STATE OF ALASKA,

Petitioner,

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NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The Ninth Circuit opinion is reported at 101 F.3d 1286 and reprinted in the petition appendix ("Pet. App.") at 1a. That opinion reversed the order of the District Court for the District of Alaska on Indian country, which is unreported and reprinted at *id.* 37a. The District Court order on tribal status, which was not appealed, is unreported and reprinted at *id.* 80a. The Ninth Circuit opinion in the prior appeal is reported at 856 F.2d 1384 and reprinted at *id.* 127a. That opinion affirmed the District Court ruling granting a preliminary injunction, which is unreported and reprinted at *id.* 141a.

JURISDICTION

The judgment of the Court of Appeals was entered on November 20, 1996. Pet. App. 1a. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on January 6, 1997. *Id.* 143a. The petition for certiorari

was filed on April 4, 1997, and granted on June 23, 1997. 117 S. Ct. 2478. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Alaska Native Claims Settlement Act of 1971 ("ANCSA" or "Act"), 43 U.S.C. § 1601 *et seq.*, and 18 U.S.C. § 1151, are reprinted at Pet. App. 145a-172a.

INTRODUCTION

This case arises in the shadow of ANCSA, the largest aboriginal claims settlement in United States history. ANCSA authorized the transfer of nearly one billion dollars and 44 million acres of land to state-chartered business corporations established pursuant to the Act, owned and operated by Natives from villages throughout the State, in exchange for the extinguishment of all aboriginal title and any claims based on that title. The Act expressly disavowed any intention to create a reservation or trustee relationship with the land, making the land instead a freely alienable corporate asset. Pursuant to the settlement, a 1.8 million-acre expanse of land located in north-central Alaska was conveyed in fee to two ANCSA corporations, which later conveyed the land to the Native Village of Venetie.

In 1986 the Village sought to assess $161,000 in taxes upon a contractor hired by the State to construct a public school facility there, claiming that the Venetie tract is "Indian country" within the meaning of 18 U.S.C. § 1151, and, more particularly, a "dependent Indian community" within subsection (b) of that provision.[1] Indian country is the touchstone for delineating federal, state, and tribal

[1] Under 18 U.S.C. § 1151, land is Indian country if it is (a) an "Indian reservation," (b) a "dependent Indian communit[y]," or (c) an "Indian allotment." *Id.* This case concerns only the second type of Indian country. *See* Pet. App. 138a.

jurisdiction over Indian-occupied lands. Within it Indian tribes have broad authority not only over their own members but over the land and non-members. States, on the other hand, are precluded from exercising fundamental attributes of their sovereignty within Indian country. Since territorial times, Alaska has been governed on the basic jurisdictional premise—reflecting the unique history of the land and its Natives—that there is no Indian country in Alaska.

The Ninth Circuit below held that ANCSA land qualifies for judicial designation as Indian country within Section 1151(b), and that the Venetie tract *is* Indian country. As we explain, to arrive at that far-reaching result, the Ninth Circuit fundamentally misconstrued the nature of the judicial inquiry in determining whether land is Indian country—which is properly directed to the intent of Congress—and dramatically expanded the scope of the "dependent Indian community" category of Indian country, which—until the decision below—had been relatively narrow and unremarkable, accounting for only a small portion of Indian country nationwide. In addition, the Ninth Circuit disregarded the clear intent of Congress that ANCSA land—including the Venetie tract—*not* be Indian country; indeed, the transformation of ANCSA land into Indian Country is antithetical to what the settlement was all about. The Ninth Circuit decision accordingly should be reversed.

STATEMENT OF THE CASE

Historical and Statutory Background

1a. The history of Alaska and its Natives is as unique as the vast Alaskan landscape that has long captured the imagination of the American mind. When Russian explorers "discovered" Alaska in 1741, they came upon a land of abundant natural resources and a diverse Native population, subsisting in small villages or groups along the thousands of miles of coastline and in the mountainous inland regions of the territory that would become the Nation's

49th State. In 1867, when the United States purchased Alaska from Czar Alexander II for $7.2 million, most of these communities remained intact. *See* Robert D. Arnold, *Alaska Native Land Claims* 1-26 (1975). Today, nearly 40 years after Alaska entered the Union, there are more than 225 Native villages in the State now recognized as Indian tribes, dispersed throughout a land mass about the size of Arizona, California, Oregon, Washington, and Montana—combined.

b. By the time the United States had acquired "Russian-America," as Alaska was then known, most Indians in the contiguous United States had been displaced from their aboriginal lands by war or treaty, and confined to federally established territories or reservations. Although these reservations were created expressly for the use and occupancy of Indians, Indians did not own or control the land. Rather, the land was held in "trust" for them by the federal government, and any action concerning the land was subject to exclusive federal control. At the same time, because their means of subsistence had fallen prey to westward expansion, reservation Indians were almost entirely dependent upon the federal government for food, clothing, and protection, and were often "dead[ly] enemies" of the States. *United States* v. *Kagama*, 118 U.S. 375, 383-384 (1886). *See* Arnold, *supra*, at 28-36; Felix S. Cohen, *Handbook of Federal Indian Law* 28-29, 74-92, 121-125 (1982 ed.).

In Alaska there is no history of Indian wars or treaties, and from purchase to statehood "the federal government was involved only minimally with Alaska Natives." Cohen, *supra*, at 739. Moreover, as this Court has recognized, "[t]here was never an attempt in Alaska to isolate Indians on reservations," and "[v]ery few were ever created." *Metlakatla Indian Community* v. *Egan*, 369 U.S. 45, 51 (1962).[2] Indeed, "Alaskans, both Native and non-

[2] The one notable exception is the Annette Island Reserve, or Metlakatla, established by Congress in 1891 in the territory's southeastern panhandle. Act of Mar. 3, 1891, ch. 561, § 15, 26 Stat. 1101. Metlakatla is distinct in that its members are not Alaska Natives at all, but rather nineteenth century emigrants from British Columbia. *See Egan*, 369 U.S. at 48.

Native, opposed creation of reservations on the grounds that reservations were socially divisive and tended to perpetuate a wardship rather than equality for the Natives." *United States* v. *Atlantic Richfield Co.*, 435 F. Supp. 1009, 1015 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir.), *cert. denied*, 449 U.S. 888 (1980). *Accord United States* v. *Libby, McNeil & Libby*, 107 F. Supp. 697, 699 (D. Alaska 1952); Ernest Gruening, *The State of Alaska* 365-381 (1954); *Report of the Governor's Task Force on Federal-State-Tribal Relations* (hereinafter "*Task Force Report*"), pp. 118-119 (Feb. 14, 1986).

c. Not only were Alaska Natives not sequestered from non-Native society, they were early on recruited and paid (albeit on meager terms) for their labor by non-Natives engaged in the harvesting of Alaska's natural resources, and even undertook themselves to manufacture and sell goods in the marketplace. *See* Donald C. Mitchell, *Sold American: The Story of Alaska Natives and Their Land, 1867-1959* 11, 99-133 (1997) (discussing Native involvement in salmon, mineral, whaling, timber, and other industries). As a result of such economic forces, many Alaskan towns—including some Native villages—soon became home to both Natives and non-Natives. Moreover, Alaska Natives who did not participate in Alaska's frontier economy were not dependent upon the federal or territorial government for their existence, but instead largely subsisted off the land, which—unlike the rapidly settled nineteenth century American west—in most areas remained and still remains today capable of supporting a subsistence lifestyle. *See* Arnold, *supra*, ch. 2.

At the same time, Alaska Natives, from the organization of Alaska's first civil government in 1884 forward, have been subject to the same laws as non-Natives, including the criminal code, taxes, and civil laws governing matters

such as hunting and fishing, employment, and even domestic issues. *See, e.g., Native Village of Stevens* v. *Alaska Management & Planning*, 757 P.2d 32, 35 (Alaska 1988) (state laws and taxes); *United States* v. *Sitarangok*, 4 Alaska 667 (D. Alaska 1913) (territorial public works laws); *United States* v. *Doo-Noch-Keen*, 2 Alaska 624 (D. Alaska 1905) (territorial fishing laws); *Task Force Report, supra*, at 84, 97 (territorial laws and taxes). The same was true even with respect to the few reservations that existed in Alaska, *see Egan*, 369 U.S. at 51, despite the fact that reservation Indians in the lower 48 States were generally not subject to state or territorial laws, but instead a special body of federal and tribal law reserved for such "Indian country." *See* Cohen, *supra*, at 27.[3]

On occasion, Alaska Natives attempted to avoid application of state or territorial law, or to take advantage of federal Indian law, on the ground that a particular offense or activity occurred in Indian country. These efforts, however, were consistently rejected by the courts, which held that, because of "the anomalous condition of Alaska," Indian country does not exist there. *Kie* v. *United States*, 27 F. 351, 353 (D. Or. 1886). *Accord United States* v. *Booth*, 161 F. Supp. 269 (D. Alaska 1958); *In re Sah Quah*, 31 F. 327 (D. Alaska 1886); *United States* v. *Seveloff*, 27 F. Cas. 1021 (D. Or. 1872); *cf. Egan*, 369 U.S. at 51-52 (even the Metlakatla reservation is "not 'Indian country' ").[4] Federal officials and others responsible for governing the Alaska Territory early on formed

[3] Accordingly, when this Court described as "deeply rooted in the Nation's history" the "policy of leaving Indians free from state jurisdiction and control," *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 168 (1973) (internal quotation omitted), it expressly distinguished its consideration of the laws governing Alaska Natives in *Egan*. *See id.* at 167-168.

[4] Prior to this case, only one reported federal decision had recognized Indian country in Alaska—*In re McCord*, 151 F. Supp. 132 (D. Alaska 1957)—involving the Moquawkie Indian Reserve at Tyonek. Although *McCord* was never followed by other courts, it did prompt Congress to include Alaska among the Public Law 280

the same view. *See, e.g.*, DOI, *Opinion Regarding Legal Status of Alaska Natives*, 19 Pub. Lands Dec. 323, 325 (1894) ("Alaska is not Indian country"); Pet. 12-13 (citing authorities).[5]

d. Alaska Natives also have enjoyed a unique tradition of participation in state and local government. As early as 1916, Natives in the southeastern part of Alaska had cast the deciding ballots in territorial elections. *See* Mitchell, *supra*, at 212-213. Shortly thereafter, the Alaska Territorial Legislature amended its laws to permit Native villages to organize municipal governments, and several did so. *See Task Force Report, supra*, at 93.[6] The

States (*see* 18 U.S.C. § 1162(a)) to ensure that state criminal law was not ousted from Tyonek. *See* Dep't of the Interior ("DOI"), *Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers*, Sol. Op. M-36975, p. 36 (Jan. 11, 1993) (hereinafter "DOI Op."). Copies of this DOI Opinion have been lodged with the Court and served on respondents.

[5] *See also* Letter from R. Ernst, Asst. Sec'y, DOI, to Hon. E. Celler, (Feb. 25, 1958), *reprinted in* S. Rep. No. 85-1872, at 3 (1958) ("[T]he general understanding had been that the many native villages in Alaska were not Indian country, and it had been the general practice for Territorial officers to apply Territorial law in the native villages."); Letter from R. Wilbur, Sec'y, DOI, to Hon. E. Howard (Mar. 14, 1932), *reprinted in Authorizing the Tlingit and Haida Indians to Bring Suit in the United States Court of Claims: Hearing on S. 1196 Before the Senate Comm. on Indian Affairs*, 72d Cong., 1st Sess. 15-16 (1932) ("Alaska has never been regarded as Indian country."); Lyman E. Knapp, *A Study Upon the Legal and Political Status of the Natives of Alaska*, 39 Am. L. Reg. 325, 328, 332 (1891) ("The courts have * * * repeatedly decided that Alaska is not Indian country").

[6] Since 1936 Alaska Native villages also have been permitted to form governments pursuant to the Indian Reorganization Act ("IRA"), 25 U.S.C. § 461 *et seq.* Sixty-nine villages eventually did so. DOI Op., p. 3. Even the application of the IRA, however, has been different in Alaska: in the lower 48 States, an Indian tribe may not organize an IRA government unless it resides on a reservation; however, Native villages in Alaska were permitted to form such governments in the absence of a reservation, which of course most Native villages lacked. *See* J.A. 151.

organization of such local governments accelerated after statehood. *Id.* at 25. Over the years, moreover, numerous Native leaders have gained "prominent public office in the state government," *Egan*, 369 U.S. at 51, as well as in the prior Territorial Legislature, and, given the State's unique demographics, Alaska Natives to this day wield genuine political influence through the ballot box. *See* Mitchell, *supra*, at 12, 217.

2a. Because Alaska Natives were not categorically displaced from their land, there was little need throughout most of Alaska's history to address the status of the title to the vast areas of land they occupied. In the 1960s, however, two events brought this issue to a head. First, the State began selecting the 103 million acres of land to which it was entitled under the Statehood Act, Act of July 7, 1958, Pub. L. No. 85-508, § 6(a) & (b), 72 Stat. 339, 340, prompting Native opposition and eventually leading the Secretary of the Interior in 1966 to impose a freeze on further selections. Second, in the midst of this dispute, oil was discovered on the Arctic Slope, heightening the need to resolve land claims so that this resource could be developed and transported. *See* DOI Op., pp. 73-76; *Atlantic Richfield Co.*, 435 F. Supp. at 1016-18.

b. There followed more than four years of intense deliberations in Congress aimed at settling Alaska Native land claims. During this process, Alaska Natives—represented *en masse* by the Alaska Federation of Natives ("AFN")—made clear that they "very vehemently" opposed any settlement based on the reservation concept. *Alaska Native Land Claims: Hearings on S. 2906 Before the Senate Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 89 (1968) (hereinafter *"Hearings on S. 2906"*). They also opposed the concept—advanced by the Secretary of the Interior—that the federal government would hold the land in trust. *Id.* at 576. *See* DOI Op., p. 89. Instead, rather than "some modified form

of reservation or paternalism," Alaska Natives urged Congress to adopt "a bold and imaginative approach which fully and finally resolves all claims, * * * and permits the Natives to improve themselves and their land and determine their own destiny." *Alaska Native Land Claims: Hearings on H.R. 13142 and H.R. 10193 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 181 (1969) (hereinafter *"Hearings on H.R. 13142"*). In ANCSA, Congress did just that.

Passed in December 1971, ANCSA authorized the transfer of $962.5 million and 44 million acres of land in exchange for the extinguishment of aboriginal title and any claims based on that title. 43 U.S.C. §§ 1603(c), 1605, 1611. Congress sought to effect this settlement by "maximiz[ing] participation by Natives in decisions affecting their rights and property * * * without creating a reservation system or lengthy wardship or trusteeship." *Id.* § 1601(b). Thus, it expressly revoked the few reservations that had been created in Alaska (save Metlakatla), *id.* § 1618(a), and provided for the creation of more than 200 state-chartered village and regional corporations, owned and operated by Natives as for-profit businesses subject to state law. *Id.* §§ 1606, 1607. It then conveyed the land to these business corporations in fee, leaving it a freely alienable corporate asset. *Id.* §§ 1611, 1613. To encourage Native villages to adopt municipal governments under state law, Congress required the new ANCSA corporations to reconvey a portion of their land to the existing municipal government or, if none existed, to the State in trust until one was established. *Id.* § 1613(c)(3).

c. Fittingly, in light of the unique history of Alaska and its Natives, ANCSA marked a dramatic break with prior federal Indian legislation, which had been enacted with the Indians of the lower 48 States in mind. *See* Pet. 5 & n.5 (citing authorities). Consistent with Congress' intent, thousands of acres of ANCSA land have

been reconveyed since the statute was enacted—including to non-Natives "in the ordinary course of business and at a profitable return," Thomas R. Berger, *Village Journey: The Report of the Alaska Native Review Commission* 99 (1995 ed.)—and ANCSA land has been subject to lucrative land swaps. At the same time, nearly 50 Native villages have formed municipal governments after ANCSA—bringing the total to 125—entitling such villages to share in a state-wide municipal assistance fund, and further integrating Natives into Alaska's body politic. *See Task Force Report*, *supra*, at 24.

In the wake of ANCSA those responsible for governing Alaska have reaffirmed the historical understanding that Indian country does not exist in that State. *See* Alaska Admin. Order No. 125 (Aug. 16, 1991). In 1988—more than 15 years after ANCSA was passed—the Alaska Supreme Court reiterated that "[t]here is not now and never has been an area of Alaska recognized as Indian country." *Native Village of Stevens*, 757 P.2d at 35 (internal quotation marks omitted).[7] In 1993 the Solicitor of the Department of the Interior ("DOI"), the federal agency charged with implementing ANCSA, 43 U.S.C. § 1624, and with overseeing Indian affairs in general, 25 U.S.C. § 2, issued a 133-page opinion—concurred in by the Acting Secretary—which thoroughly canvassed ANCSA and its historical backdrop, and concluded in unambiguous terms that "ANCSA precludes the treatment of lands received under that Act as Indian country." DOI Op., pp. 131, 133.

Factual and Procedural Background

1a. This case arises due to the efforts of the Native Village of Venetie to chart an altogether different course. The members of this Village—descendants of the Neets'aii

[7] The *Stevens* court recognized as a possible exception the Moquawkie reserve considered in *McCord*, 757 P.2d at 35 & n.4, but that reserve was revoked by ANCSA. 43 U.S.C. § 1618(a).

Gwich'in—reside in the communities of Arctic Village and the Village of Venetie in north-central Alaska, at the southern foot of the Brooks Mountain Range. Pet. App. 83a. In 1943 the Secretary of the Interior designated 1.8 million acres of land around these villages as one of the few reserves created in Alaska. *Id.* 2a. When Congress debated ANCSA, the Village proposed an amendment that would have allowed it to elect to retain the land's reservation status. *Id.* 116a; J.A. 146. But Congress rejected that amendment and, instead, expressly revoked the former Venetie reserve. 43 U.S.C. § 1618(a).

b. Following the passage of ANCSA, Arctic Village and the Village of Venetie each established ANCSA corporations under state law, as they were required to do under the Act to receive land as part of the settlement. *Id.* § 1607(a); Pet. App. 4a. In 1973 these corporations selected the option under the settlement of taking fee title to the 1.8 million-acre Venetie tract, *see* 43 U.S.C. § 1618(b), rather than receiving other available land and monetary benefits. Six years later, the ANCSA corporations unilaterally deeded this land to the Native Village of Venetie Tribal Government, then were dissolved. Pet. App. 4a.

In 1978 the Village—returning to its strategy of seeking to restore its former reserve—asked the federal government to take the land into trust. But the government refused to do so. *See id.* 78a n.40; DOI Op., p. 112 n.276. As the Solicitor of DOI explained to the Village at the time, "the Secretary simply does not have the authority to ignore the policy and statutory provisions of [ANCSA] and restore the former Venetie Reserve to trust status." J.A. 143. In 1980 the Village sought federal approval of an oil and gas exploration agreement between it and a private company, but DOI rejected that request as well, again reiterating that under ANCSA it has no supervisory role over Venetie. *See* J.A. 155. Accordingly, as even the Ninth Circuit acknowledged, "[t]oday, Venetie

owns its land in fee simple, and the federal government exercises few controls (if any) over Venetie's territory." Pet. App. 29a.

2a. This litigation stems from the Village's effort to tax non-members for commercial activity in Venetie. In 1986 the State, acting through the Yukon Flats School District, entered into a contract with a joint venture for the construction of a public school facility in the Village of Venetie financed with state funds. In December 1986 the Village notified the contractor that it owed $161,000 pursuant to a five percent business activity tax the Village had recently enacted on "source gains" derived from commercial activity on the land. When neither the contractor nor the State—"the party responsible for paying the tax" under the contract, *id.* 4a—paid the tax, the Village sought to collect it in tribal court from the State, the school district, and the contractor. *Id.*

The State thereupon brought this federal action for declaratory and injunctive relief in the Alaska District Court, challenging the Village's jurisdiction to impose the tax. The Village moved to dismiss, arguing, *inter alia*, that, as an Indian tribe, it is entitled to tax non-Natives who engage in commercial activities in Venetie because the land is "Indian country" within 18 U.S.C. § 1151(b). The District Court rejected that motion and preliminarily enjoined the Village from attempting to collect the tax. Pet. App. 4a, 141a. The Ninth Circuit affirmed the injunction and remanded for further proceedings. *Id.* 140a.

b. On remand, the District Court ruled in December 1994 that "the Neets'aii Gwich'in are a sovereign tribe as a matter of common-law," and thus are entitled to govern their *own members* for internal purposes. *Id.* 126a.[8]

[8] Generally speaking, Indian tribes may govern their own internal affairs, and thus may "punish tribal offenders," "determine tribal membership," "regulate domestic relations," and "prescribe rules for inheritance for members." *Montana* v. *United States*, 450 U.S. 544, 564 (1981). Tribal jurisdiction to regulate land and the activities of non-members, however, turns on whether the tribes occupy Indian country. That is the nub of the dispute here.

That ruling was not appealed and is not at issue here. In August 1995, however, the District Court ruled that the 1.8 million-acre Venetie tract is *not* Indian country within Section 1151(b), and that, accordingly, the Village is not sovereign over the *land* and lacks authority to tax non-members doing business upon it. Pet. App. 79a.

The District Court focused on "the question of whether land has been validly set apart for the use of Indians as such, under superintendence of the government." *Id.* 49a. It found federal superintendence absent, because under ANCSA "[t]he federal government no longer has any right or responsibility for the active supervision of Alaska Natives with respect to the lands which they occupied after extinguishment of aboriginal title." *Id.* 70a. The requisite set aside was also missing, because ANCSA land was not conveyed to Indians as such, but rather to state-chartered business corporations to do with as they see fit. *Id.* 77a-79a. The subsequent conveyance from the ANCSA corporations to the Village was the product of a "unilateral decision" of those private entities, *id.* 79a, "not joined in nor approved by the federal government." *Id.* 75a.

3a. A divided panel of the Ninth Circuit reversed. It rejected the District Court's test for determining whether land constitutes Indian country, concluding instead that a "factually dependent," "more textured six-factor inquiry" was required. *Id.* 12a (internal quotation marks omitted). Applying that test, the panel held that "[ANCSA] did not extinguish Indian country in Alaska as a general matter, and that the land Venetie occupies is Indian country." *Id.* 2a.

Even though it candidly acknowledged that "the federal government exercises few controls (if any) over Venetie's territory," the panel found superintendence based on the fact that the Native inhabitants of Venetie participate in a

"patchwork of [federal] benefit programs." *Id.* 22a, 29a. The court then concluded that a set aside had occurred because the ANCSA corporations that received the land—while plainly not Indian tribes—nevertheless had a "Native identity." *Id.* 15a, 30a. Having swept ANCSA to one side, the panel then proceeded—within the loosely worded contours of its multi-factor balancing test—to conclude that Venetie is Indian country within Section 1151(b). Pet. App. 31a.

b. Judge Fernandez wrote separately. He explained that "[i]f ANCSA meant anything at all, it meant that the tribes, as such, would no longer have control or sovereign power over the land. They would only have sovereignty over their members." *Id.* 35a. The panel's ruling not only contravened Congress' intent, but invited "a blizzard of litigation throughout the State of Alaska as each and every tribe seeks to test the limits of its power over what it deems to be its Indian country," a process that would create a "crazy quilt" of state and tribal jurisdictional enclaves in Alaska. *Id.* 35a-36a. Judge Fernandez nevertheless joined the panel opinion in light of circuit precedent he found binding on the Indian country issue. *Id.*

This Court granted certiorari. 117 S. Ct. 2478.

SUMMARY OF ARGUMENT

I. The authority of the Native Village of Venetie to tax non-members doing business in Venetie turns on whether the land is "Indian country." Congress has defined Indian country to include (a) "Indian reservation[s]," (b) "dependent Indian communities," and (c) "Indian allotment[s]." 18 U.S.C. § 1151. The vast bulk of Indian country nationwide has been clearly designated by Congress as an Indian reservation or an allotment. The other type of Indian country—the dependent Indian community—has existed thus far as a relatively narrow adjunct to the categories that surround it in the statutory

listing. The Ninth Circuit decision below changes all that, transforming the heretofore discrete "dependent Indian community" category of Indian country into a *major* form of Indian country nationwide. That result not only expands Section 1151(b) far beyond its congressionally intended scope, but transfers from Congress to the courts the authority to make vast areas of Alaska—and, indeed, of the United States—Indian country.

Section 1151(b) was enacted to codify the definition drawn by *United States* v. *Sandoval*, 231 U.S. 28 (1913), and *United States* v. *McGowan*, 302 U.S. 535 (1938). Those cases establish that congressional intent is the touchstone of the Indian country inquiry, and that a "dependent Indian community" is land that Congress has clearly set aside for Indians as the equivalent of an Indian reservation. This construction comports with the general rule stated by this Court for determining whether land is Indian country, which looks to whether Congress has "validly set apart [the land] for the use of the Indians as such, under the superintendence of the Government." *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (internal quotation marks omitted). The Ninth Circuit's indeterminate, six-factor "dependent Indian community" test bears little resemblance to the inquiry codified in Section 1151(b), and is singularly ill-suited for a threshold jurisdictional determination such as whether Indian country exists.

II. The land conveyed under ANCSA—including the Venetie tract—is not Indian country within Section 1151(b) because Congress did not set that land aside as the equivalent of an Indian reservation, or anything like one. Indeed, that was the one thing above all that Congress—at the urging of Alaska Natives, the State, and others—made clear it did not want to accomplish via the settlement. Thus, Congress in ANCSA expressly revoked the few reserves that had existed in Alaska (including the former Venetie reserve) and disavowed any reservation or trustee relationship with the land. 43 U.S.C. §§ 1601(b)

& 1618(a). That express congressional intent—codified in the statute itself and resounding throughout the entire legislative record—alone precludes judicial designation of ANCSA land as Indian country within Section 1151(b).

Nor does ANCSA land qualify as Indian country under the general rule formulated by this Court. In ANCSA, Congress did not set aside the land for the use of tribes or Natives *as such*, but instead conveyed it to private business corporations, formed under and subject to state law. *Id.* §§ 1606(d) & 1607(a). That distinction was key to Congress' goal of achieving a settlement "without establishing any permanent racially defined institutions." *Id.* § 1601(b). Thus, ANCSA land is a freely alienable corporate asset, which may be—and has been—conveyed to Natives *or* non-Natives. In this respect, the later conveyance of the Venetie tract from the ANCSA corporations to the Village was not by any stretch of the imagination a *federal* set aside; it was the voluntary act of *private* companies. Because the decision to create Indian country is emphatically one for Congress to make, neither Indians nor such private companies may create Indian country of their own volition.

ANCSA also precludes any finding of federal superintendence. Indeed, the Act is antithetical to the outdated notions of dependence and superintendence that gave rise to the "dependent Indian community" category of Indian country in the first place. ANCSA sought to "maximiz[e] participation by Natives in decisions affecting their rights and property," *id.* § 1601(b), not to subordinate such decisions to federal agents. Moreover, far from establishing federal jurisdiction and control over the land, Congress sought to enhance state and local control by subjecting ANCSA corporations to state law and even taxation, *id.* §§ 1607(a) & 1620(d)—which itself belies any notion that Congress intended to make the land sovereign Indian country. The eligibility of Alaska Natives to participate in general federal assistance programs certainly does not establish the requisite federal superintendence over the land; and, in any event, as even the Ninth Circuit acknowledged, the federal government has been replaced in the wake of ANCSA by the State or Natives themselves as the direct provider of such assistance, including in Venetie.

III. The jurisdictional and practical consequences of designating ANCSA land as Indian country also counsel against any conclusion that Congress intended to permit the courts to do so. The Ninth Circuit Indian country regime will create enormous uncertainty and confusion over the boundaries and extent of state, federal, and tribal sovereignty within vast areas of Alaska. This will result in protracted litigation, which Congress expressly sought to avoid through ANCSA. *Id.* § 1601(b). In addition, transforming ANCSA land into Indian country will impede implementation of numerous important state regulatory programs, empower Native villages to tax ANCSA corporations out of existence, and leave the State with full jurisdictional authority over less than 3% of all privately held land in Alaska. The absence of *any* discussion in ANCSA's voluminous legislative record of such obvious and far-reaching implications of designating settlement land as Indian country provides still more confirmation that Congress intended nothing of the sort.

So, too, does the most astonishing result of the Ninth Circuit Indian country regime: the establishment of a gigantic reservation system in Alaska, nearly doubling the total area of Indian country nationwide. Because of its unique history and geography, Alaska and its Natives were spared the reservation policy adopted by the federal government in its relations with Indians in the lower 48 States. That policy has left in its wake a decidedly mixed legal legacy, including the notion of a "dependent Indian community" itself. As the ANCSA Congress recognized, Alaska—the Nation's last frontier—provided an opportunity for a new approach, one freed from outworn entanglements with an Indian policy formed for a different time and place. In seizing that opportunity, Congress

made clear its intent that ANCSA land not be Indian country or, indeed, anything like it. This Court should give effect to that intent.

ARGUMENT

I. THE NINTH CIRCUIT FUNDAMENTALLY MISTOOK THE JUDICIAL INQUIRY INTO WHETHER LAND IS INDIAN COUNTRY AND MISCONSTRUED THE "DEPENDENT INDIAN COMMUNITY" CATEGORY OF SECTION 1151.

1. The authority of the Native Village of Venetie to levy the tax at issue in this case turns on whether the Venetie tract is "Indian country."[9] Indian country is the jurisdictional touchstone for delineating federal, state, and tribal authority over Indian-occupied lands. *See Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 125 (1993); *Narragansett Indian Tribe* v. *Narragansett Elec. Co.*, 89 F.3d 908, 915 (1st Cir. 1996); Cohen, *supra*, at 27, 256 & n.115. Within it tribes possess broad authority —subject to federal limitations—to govern not only their own members, but also the land and non-members. States, on the other hand, are precluded from exercising fundamental attributes of their sovereignty within Indian country. *See New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983); *Bryan* v. *Itasca County*, 426 U.S. 373, 376 (1976); *DeCoteau* v. *District County Court*, 420 U.S. 425, 427 & n.2 (1975); Pet. 12.

2a. Congress—which has plenary control over Indian affairs, *see* U.S. Const. art. I, § 8; *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989)—alone has the authority to create (or sanction the creation of) Indian country. Accordingly, the determination whether land is Indian country is ultimately a matter of ascertaining Con-

[9] That much is undisputed. *See* Br. for Native Village of Venetie, *et al.*, p. 13 (9th Cir.) ("The presence of 'Indian country' is both critical and fundamental since the power to tax must be exercised within a Tribe's territorial jurisdiction, *i.e.*, Indian country."); *accord* Pet. App. 6a (Ninth Circuit), 39a (District Court).

gress' intent. *See Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586 (1977) ("The underlying premise [in this area] is that congressional intent will control"); *United States* v. *Soldana*, 246 U.S. 530, 531 (1918) ("Whether or not [land] is Indian country depends upon the construction to be given the act of Congress"). *See also* Cohen, *supra*, at 41 ("Recognition or establishment of lands as * * * a dependent Indian community * * * is essentially a matter of the purpose of Congress and of the Executive Department").

b. Congress has delineated the extent of Indian country in 18 U.S.C. § 1151. That provision—enacted in 1948 as part of a general revision of Title 18—states that "Indian country" is:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, * * * (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished * * *. [18 U.S.C. § 1151.[10]]

The vast bulk of the reported 56 million acres of Indian country nationwide, *see* DOI, *American Indian Today* 9 (3d ed. 1991), was clearly designated by Congress as either a reservation (§ 1151(a)) or an allotment (§ 1151(c)), "explicitly invoking the statutory terms." Cohen, *supra*, at 28. The other category of Indian country under Section 1151—the dependent Indian community —represents only a tiny portion of Indian country nation-

[10] While this definition is found in the criminal code, this Court has made clear that it governs for purposes of establishing civil as well as criminal jurisdiction over Indian matters. *See Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 115 S. Ct. 2214, 2217 n.2 (1995); *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 (1987); *DeCoteau* v. *District County Court*, 420 U.S. at 427 n.2.

wide and has received comparatively scant attention. As the Ninth Circuit observed below, this Court "has never resolved * * * the test for determining whether a tribe constitutes a dependent Indian community within the meaning of § 1151(b)." Pet. App. 6a. *Accord Narragansett Indian Tribe* v. *Narragansett Elec. Co.*, 89 F.3d at 917; *Pittsburg & Midway Coal Mining Co.* v. *Watchman*, 52 F.3d 1531, 1545 (10th Cir. 1995).

The limited scope of the "dependent Indian community" category of Indian country is nevertheless quite clear. The Reviser's Notes to Section 1151 confirm that this provision was intended to codify the definition established by this Court's decisions in *United States* v. *Sandoval* and *United States* v. *McGowan*. *See United States* v. *John*, 437 U.S. 634, 648 (1978); *United States* v. *Levesque*, 681 F.2d 75, 77 (1st Cir.), *cert. denied*, 459 U.S. 1089 (1982); DOI Op., p. 115; Cohen, *supra*, at 38. Those cases establish that the dependent Indian community category of Indian country is—as historical experience suggests—a narrow one, grounded like the other two categories of Indian country that surround it in the statutory listing in a clear congressional purpose to create Indian country.[11]

c. The phrase "dependent Indian communities" comes from *Sandoval*. 231 U.S. at 46. That case involved the authority of the federal government to enforce its laws governing the introduction of liquor into "Indian country" on the Pueblo lands in New Mexico. Significantly, it was undisputed in *Sandoval* that Congress itself had specified that the Pueblo lands *were* "Indian country." *See id.* at 37 n.1 (" 'Indian country * * * shall * * * include all

[11] This construction comports with the maxim *noscitur a sociis*—that "a word is known by the company it keeps"—which this Court applies in order "to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). *See Beecham* v. *United States*, 511 U.S. 368, 371 (1994); *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 36 (1990).

lands now owned or occupied by the Pueblo Indians of New Mexico' ") (quoting statute); *id.* (" 'the terms "Indian" and "Indian country" shall include the Pueblo Indians of New Mexico and the lands now occupied by them.' ") (quoting statute). The only question was whether that express congressional designation could be given effect.

The Court answered in the affirmative, emphasizing that "the questions whether, to what extent, and for what time [Indians] shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by *Congress*, and not by the courts." *Id.* at 46 (emphasis added). Underlying that determination was the Court's finding that the Pueblo Indians "are dependent upon the fostering care and protection of the [federal] Government, like reservation Indians in general." *Id.* at 41. Because there was no question that Congress—having expressly said so—intended that "the lands then owned or occupied by the Pueblo Indians should be deemed and treated as Indian country," the Court held that the federal Indian laws applied there. *Id.* at 37-38, 49. The lesson of *Sandoval*, accordingly, is that—even when it comes to the "dependent Indian community" category of Indian country—the designation of lands as Indian country is one for Congress, not the courts.[12]

McGowan is of like tenor. It concerned land purchased and set apart by Congress as a permanent settlement for

[12] The Ninth Circuit below repeatedly adverted to the fact that the Pueblo lands at issue in *Sandoval* were owned in fee by the Indians, not the federal government. *See* Pet. App. 11a, 18a, 29a. In fact, however, the Pueblos' "fee" ownership was dramatically circumscribed by the statute designating those lands as Indian country, which placed the lands " 'under the absolute jurisdiction and control of the Congress of the United States.' " *Sandoval*, 231 U.S. at 37 n.1 (quoting statute). More to the point, Congress had expressly designated those lands as " 'Indian country.' " *Id.* (same). That express designation was determinative, regardless of the status of the title to the land.

"needy Indians scattered over the State of Nevada," which Congress had designated as an "Indian Colony." 302 U.S. at 537. *See* Act of May 10, 1926, ch. 278, 44 Stat. 496. The United States argued that the Indian Colony was "Indian country" on the ground that "it was in effect an Indian reservation," Br. for United States 19, a view shared by the Secretary of the Interior. *See* Memorandum of C. Westwood, Asst. Solicitor, DOI (Apr. 7, 1958) ("[T]he Department knows no reason why the colony was termed a colony instead of a reservation and * * * in the opinion of the Department there is no practical distinction between an Indian reservation and an Indian colony.") (Pl. Ex. 8). This Court agreed, finding that "Indians in this colony have been afforded the same protection by the government as that given Indians in other settlements known as 'reservations.'" 302 U.S. at 538.

The *McGowan* Court explained that "it is immaterial whether Congress designates a settlement as a 'reservation' or 'colony,'" since the settlement in question shared the same attributes as a reservation: it was "validly set apart for the use of the Indians"; "[i]t is under the superintendence of the Government"; and "[t]he Government retains title to the lands which it permits the Indians to occupy." *Id.* at 538-539. Citing *Sandoval*, the Court also reiterated that "Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out." *Id.* at 538 & n.11. *McGowan* therefore reaffirms that congressional intent is the touchstone, and that the "dependent Indian community" category of Indian country consists of Indian land that is like a reservation in everything but the name Congress gives it.

Section 1151(b) was intended to do no more than codify the definition carved by *Sandoval* and *McGowan*. *See John*, 437 U.S. at 648.[13] When a concept—such as

[13] The Reviser's Notes expressly state as much and, as this Court has recognized, the 1948 recodification was as a general matter not intended to effect any change in the existing law—represented in this instance by *Sandoval* and *McGowan*—that Congress sought to codify. *See Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 162 (1972); *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957).

the dependent Indian community—"is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947). Here that "soil"—*Sandoval* and *McGowan*—supplies a distinctly circumscribed meaning to Section 1151(b): a "dependent Indian community" is land that Congress has set aside for Indians as the equivalent of an Indian reservation. *See, e.g.*, Cohen, *supra*, at 45 n.154 ("a dependent Indian community is equivalent to an Indian reservation"); *id.* at 38-39 (same); Heather Noble, *Tribal Powers to Regulate Hunting in Alaska*, 4 Alaska L. Rev. 223, 248 (1987) ("the term dependent Indian community includes lands occupied by Indians that are functionally equivalent to reservations"); DOI Op., pp. 114-115 (same).[14]

[14] Both *Sandoval* and *McGowan* dwell on the dependent nature of the Indian communities and people at issue. In *Sandoval* the Court termed the Pueblos "essentially a simple, uninformed and inferior people," 231 U.S. at 39; in *McGowan* it characterized the Reno Indians as "needy" and noted that Congress had appropriated funds for their "civilization." 302 U.S. at 537 & n.4. The fact that such outdated notions of cultural superiority lie at the core of the dependent Indian community category of Indian country provides another reason to construe it narrowly. *See* James E. Lobsenz, *"Dependent Indian Communities": A Search for a Twentieth Century Definition*, 24 Ariz. L. Rev. 1, 2 (1982) ("The 'quasi-sovereign' or 'dependent' status of the Indian tribe is inextricably linked to past concepts of the Indian as an uncivilized savage who was to be gradually elevated to the level of a civilized human being.").

Certainly a court should be reluctant to assume today that Congress operated on the basis of such notions, and—as even decisions from an era willing to reach judgments on such matters recognized—these matters "are to be determined by *Congress*, and not by the courts." *Sandoval*, 231 U.S. at 46 (emphasis added). In

d. This construction comports with the Court's general approach in Indian country cases. This Court has said that "the test for determining whether land is Indian country [under Section 1151]" is "whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government.'" *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 511 (quoting *John*, 437 U.S. at 648-649; *McGowan*, 302 U.S. at 539). Nothing in this general rule supports an expansion of the "dependent Indian community" category of Indian country beyond the bounds delineated by this Court in *McGowan* and *Sandoval*, and codified by Congress in Section 1151(b).

The phrase "validly set apart for the use of the Indians as such, under the superintendence of the Government" comes from *United States* v. *Pelican*, 232 U.S. 442, 449 (1914). *See John*, 437 U.S. at 648-649. The Court in *Pelican* used the phrase to describe a clearly designated Indian reservation. 232 U.S. at 449 ("the original reservation was Indian country simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the Government").[15] *See also Donnelly* v. *United States*, 228 U.S. 243, 269 (1913) (Indian country is land "lawfully set apart as an Indian reservation"). In *McGowan* the phrase was used to refer to a congressionally designated "Indian Colony," which, the

any event, insofar as dependence is concerned, the lesson of these cases is that the Indian communities did not simply receive federal assistance; the federal government had explicitly undertaken to enter their everyday lives, to protect them, and to provide for their very means of existence. *See id.* at 41; *McGowan*, 302 U.S. at 537 & n.5.

[15] The *Pelican* Court went on to hold that allotments from the reservation continued to constitute Indian country when distributed to Indians, "the Government retaining control." 232 U.S. at 449. *See* 18 U.S.C. § 1151(c). Congress had specified that the allotments were to be held in trust by the United States and be inalienable during the pertinent period. 232 U.S. at 447.

Court found, was indistinguishable from a reservation. 302 U.S. at 537. And in *John* the phrase was again used to refer to a clearly designated reservation. *See* 437 U.S. at 649. Thus, in *every case* cited for the general "Indian country" rule the land was either specifically designated by Congress as a "reservation," its equivalent, or an "allotment," or was held by the United States in trust.

3a. The Ninth Circuit decision below transforms the heretofore discrete "dependent Indian community" category of Indian country into a *major* form of Indian country nationwide. In one fell swoop, that decision makes the 44 million acres of land conveyed under ANCSA eligible for judicial designation as Indian country. In doing so, moreover, it makes the courts rather than Congress the principal arbiter of Indian country in Alaska, transferring from Congress to the courts the power to allocate the sovereign authority of the State of Alaska, federal government, and hundreds of Indian tribes over vast areas of Alaska and, indeed, of the United States.

b. This result is largely the product of the dependent Indian community test adopted and applied by the Ninth Circuit below. That test departs dramatically from this Court's precedents, discussed above, and thus from Section 1151(b). While this Court has focused on evidence that *Congress* intended to set aside the land in question as Indian country—and has insisted on the most unambiguous evidence of that intent when Congress has not actually proclaimed the land as "Indian country," a "reservation," or an "allotment"—the Ninth Circuit looked to a six-factor, fact-intensive "functional" balancing test that by its terms seems not to concern itself with congressional intent at all. *See* Pet. App. 8a, 13a.

While this Court has looked to Congress' intent to set the land apart for Indians under federal ownership and control, the Ninth Circuit simply considered "the *degree* of

federal ownership of and control over the area" and "the *extent* to which the area was set aside for the use, occupancy, and protection of dependent Indian peoples," to ensure "*some* federal connection to the land at issue." *Id.* 7a-9a & n.1, 13a (emphases added). And while this Court has found the requisite dependency and superintendence when the government relocated Indians with "no protection whatever" to "a permanent settlement" which it "supervised and equipped," *McGowan*, 302 U.S. at 537 & n.5 (internal quotation marks omitted), or when federal "superintendents" determined that the Indians were "dependent on the fostering care and protection of the Government," *Sandoval*, 231 U.S. at 41, the Ninth Circuit found those criteria met by a mere "patchwork of benefit programs." Pet. App. 22a.

The test Congress distilled from this Court's cases and codified in Section 1151(b) is circumscribed and reasonably precise—as befits a test serving the threshold function of delineating the respective parameters of federal, state, and tribal jurisdiction—and calls upon the courts to undertake a task to which they are both suited and accustomed: ascertaining Congress' intent. In contrast, the Ninth Circuit's test—like all amorphous, multi-factor tests—is "hard to apply," "jettison[s] relative predictability for the open-ended rough-and-tumble of factors," and "invit[es] complex argument in a trial court and a virtually inevitable appeal," all of which is especially unacceptable for threshold *jurisdictional* determinations. *Grubart* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995); *see* Pet. 28-30.

c. This Court should reject the ill-conceived and far-reaching Ninth Circuit test, and instead construe the "dependent Indian community" category of Section 1151 according to its congressionally intended scope. Construing Section 1151(b) based on its actual meaning, the only plausible conclusion in this case is that ANCSA land does not fall within, or even anywhere near, the dependent In-

dian community category of Indian country. For, based on what *Congress* said about the land conveyed under ANCSA, it is clear that Congress neither designated that land as Indian country nor set it aside for the benefit of Indians as the equivalent of a federally supervised reservation. Indeed, Congress—at the behest of Alaska Natives—was explicit that this was the one thing above all it did *not* intend.

II. THE CLEAR INTENT OF CONGRESS IN ENACTING ANCSA FORECLOSES ANY JUDICIAL DETERMINATION THAT LAND CONVEYED UNDER THAT ACT IS INDIAN COUNTRY.

A. Congress' Express Revocation Of Existing Reserves And Repudiation Of Any Reservation Or Trustee Arrangement Precludes Any Determination That ANCSA Land Is Indian Country.

1a. The clear intent of Congress in enacting ANCSA forecloses any judicial determination that land conveyed under that Act—including the Venetie tract—is Indian country. That conclusion is buttressed by numerous indicia of Congress' intent, but to reach it, this Court need look no further than ANCSA's express revocation of the few reserves that existed in Alaska and disavowal of the entire reservation and trustee concept. Those acts alone clearly and unmistakably establish the intent of Congress that settlement lands *not* be Indian country under Section 1151(b), because, as discussed, the "dependent Indian community" category of Indian country is limited to land that is equivalent to the very model of Indian occupation—the reservation—repudiated by ANCSA.[16]

[16] In construing ANCSA, the Ninth Circuit below placed great weight on the general canon of construction that any ambiguity in statutes affecting Indians should be resolved in favor of the Indians. *See* Pet. App. 14a-15a. As Judge Fernandez observed, however, "the provenance of ANCSA" is so "unique" that this "rule of construction * * * 'operates with less force.'" Pet. App. 34a (citing *United States* v. *Atlantic Richfield Co.*, 612 F.2d at 1139). In this case, moreover, it is debatable which construc-

b. The reservation system is itself foreign to Alaska, due to the unique history of that land and its Natives. Very few reserves were ever created, and those that were established were subject to the same local laws and taxes applicable to non-Natives and their lands, making them wholly unlike the Indian reservations of the lower 48 States. *See Metlakatla Indian Community* v. *Egan*, 369 U.S. at 51-52. In ANCSA, Congress expressly revoked the few reserves—including the former Venetie reserve—that existed, except for Metlakatla, which was exempted from the settlement altogether because its inhabitants are not Alaska Natives at all, but instead British Columbian emigrants. *See* 43 U.S.C. § 1618(a); note 2, *supra*. Respondents have characterized this revocation as a mere "technical[ity]," Opp. 11 n.8, but it was central to what ANCSA was all about.

The emphatic purpose of ANCSA was to "maximiz[e] participation by Natives in decisions affecting their rights and property * * * *without* creating a reservation system or lengthy wardship or trusteeship." 43 U.S.C. § 1601(b) (emphasis added). Alaska Natives as a group not only embraced but promoted that mission.[17] At the same time,

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tion "favors" Alaska Natives. As explained by amicus Shee Atika, Inc. and by Judge Fernandez, the Ninth Circuit construction harms ANCSA corporations and their Native shareholders. *See* Br. of *Amicus Curiae* Shee Atika, Inc. ("Shee Atika Br.") 25-28; Pet. App. 35a. In any event, there is no basis for invoking this canon one way or the other, since its trigger—ambiguity—is absent. *See South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) ("The canon of construction regarding the resolution of ambiguities in favor of Indians * * * does not permit reliance on ambiguities that do not exist, nor does it permit disregard of the clearly expressed intent of Congress"); *South Dakota* v. *Bourland*, 508 U.S. 679, 687 (1993) (same). As we explain, ANCSA clearly and unmistakably precludes any determination that ANCSA land is Indian country.

[17] *See, e.g., Hearings on H.R. 13142, supra*, at 181 ("a solution which will work * * * cannot be achieved by trinkets or doles * * * or by imposing some modified form of reservation or paternalism

they opposed the Secretary of the Interior's proposal that would have placed ANCSA lands in trust, and instead urged Congress to move in the opposite direction.[18] Alaska Natives even pointed to the Pueblos of New Mexico—whose communities were at issue in *Sandoval*—as the paradigm of what they wanted to *avoid*. *See Hearings on S. 2906, supra*, at 90 ("the Pueblos of New Mexico are frozen in history * * * and this is something we want to avoid") (Barry W. Jackson, AFN counsel). The State of Alaska shared these sentiments.[19] The re-

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upon the Alaskan Natives") (AFN memorandum); *Hearings on S. 2906, supra*, at 89 ("Alaska is a little unusual because if anything the natives in Alaska are *very vehemently antireservation* and they have never been in favor of reservations and are not today and would like to participate as fully as possible in the life of the State and the society") (Barry W. Jackson, AFN counsel) (emphasis added); DOI Op., at 89 ("[T]he choice to do away with the reservation system was one proposed and endorsed by the Native leadership relatively early on. * * * The reservation model was viewed by the Native leadership as incompatible with maximum economic self-determination.").

[18] *See, e.g., Alaska Native Land Claims: Hearing on H.R. 11213, H.R. 15049, and H.R. 17129 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 76 (1968) (hereinafter "*Hearing on H.R. 11213*") (DOI proposal); *Hearings on S. 2906, supra*, at 90 ("[W]e also are trying to get away from [the federal Bureau of Indian Affairs ("BIA")], frankly, and from the Secretary of the Interior and accomplish a transition into American society to preserve for Indians as well as for the whites the mobility which exists in American society today. We are trying to build in provisions which will prevent us from having, if you will pardon the expression, our villages frozen in history.") (Barry W. Jackson, AFN counsel); *Hearing on H.R. 11213, supra*, at 144 ("The AFN does not desire the Secretary to act as a trustee.") (AFN commentary to DOI proposal); *Hearings on S. 2906, supra*, at 576 (AFN "object[s]" to the "propos[al] that the lands go initially in trust to the Secretary") (Barry W. Jackson).

[19] *See, e.g., Hearings on H.R. 13142, supra*, at 134 ("The result [of ANCSA] should not be Indian reservations because this is contrary to the traditions of Alaska. The ownership of land held

pudiation of the Indian reservation and the trustee concept of federal Indian policy—rooted in another place and time—was central to ANCSA.

Congress made its intent surpassingly clear in this regard, not only in the text of ANCSA, 43 U.S.C. §§ 1601(b) & 1618(a), but throughout its deliberations. *See, e.g.*, S. Rep. No. 92-405, at 108 (1971) ("A major purpose of this committee and the Congress is to avoid perpetuating in Alaska the reservation and trustee system which has characterized the relationship of the Federal government to the Indian peoples in the contiguous 48 states."); S. Rep. No. 91-925, at 112 (1970) (same); H.R. Conf. Rep. No. 92-746, at 40 (1971) ("[T]he conference committee does not intend that lands granted to Natives under this Act be considered 'Indian reservation' lands," and "[t]he lands granted by this Act are not 'in trust' and the Native villages are not Indian 'reservations.'"); S. Conf. Rep. No. 92-581, at 40 (1971) (same).[20]

c. The express intent of Congress to avoid creating anything resembling a reservation or trustee arrangement itself commands the conclusion that ANCSA land is not Indian country. Indeed, as DOI observed in its 1993 opinion on the precise question presented by this case, "[i]t would be anomalous to conclude that

by Alaska natives should be no different from that of other Alaskans.") (statement of Hon. Keith H. Miller, Governor).

[20] *See also* H.R. Rep. No. 92-523, at 9 (1971) ("[ANCSA] does not establish any trust relationship between the Federal government and the Natives. The regional corporations and the village corporations will be organized under State law, and will not be subject to Federal supervision except to the limited extent specifically provided in the bill. All conveyances will be in fee—not in trust."); 117 Cong. Rec. 36865 (Oct. 19, 1971) ("Every one of the bills in our committee and the bills in the other body, all of them, eschew the reservation or trust concept. For too long we in America have been making the Natives' mistakes for them.") (Rep. Meeds); DOI Op., p. 89 (discussing same).

[ANCSA] lands are the jurisdictional equivalent of reservations, when Congress specifically abolished reservations and designed a comprehensive system of land holdings purposely intended not to be the functional equivalent of reservations." DOI Op., p. 121. This conclusion is bolstered by numerous other provisions of the Act, discussed in more detail below, including those (1) extinguishing any claims based on aboriginal use or occupation of the land, 43 U.S.C. § 1603(b), (c); (2) stripping the land of virtually any residue of its prior federal ownership, *id.* §§ 1603(b), (c), 1606, 1607(a), 1613(g), 1617, 1618(a); (3) conveying the land in fee simple to private business corporations rather than to tribes or Natives as such, *id.* §§ 1606(d), 1607; (4) subjecting those corporations and the land to state rather than federal or tribal law, *id.* §§ 1606(d), 1607(a), 1620(d); and (5) encouraging the corporations to establish municipal governments organized under state law to govern the land, *id.* § 1613(c).

2a. This is not news to the Native Village of Venetie. Recognizing the significance of the revocation of its former reserve, the Village first sought to avoid, then to circumvent this express congressional act altogether. Thus, during the legislative deliberations on ANCSA, the Village proposed an amendment that would have allowed it to elect to retain the land's reservation status, but Congress rejected that amendment. *See supra* at 11; J.A. 146. Then, after Congress had revoked the former Venetie reserve and conveyed the land under the settlement, the Village sought to have the government take the land back into trust. But DOI rejected that effort as well, explaining that, because "[t]he intent of Congress to permanently remove all Native lands in Alaska from trust status is unmistakable," J.A. 144, the Secretary had no authority to take the land into trust.[21] Having failed

[21] In its final rule concerning the acquisition of Indian land by the United States in trust, DOI reaffirmed this view, stating that

before Congress and the Executive, the Village now asks this Court to resurrect the reservation Congress revoked.

b. The Village argues that through Section 1618(b) of ANCSA it "opted out" of the settlement to be "'re-unifi[ed] * * * with its former reservation.'" Opp. 11 (quoting Pet. App. 31a).[22] But nothing of the sort was permitted by ANCSA. When Congress revoked the former Venetie reserve, 43 U.S.C. § 1618(a), it stripped the land of any vestiges of Indian country status. *See, e.g.*, *Hagen* v. *Utah*, 510 U.S. 399, 401 (1994) ("If the reservation has been diminished, then [the land] within the historical boundaries of the reservation, is not in 'Indian country.'"); *Solem* v. *Bartlett*, 465 U.S. 463, 467 (1984) (same); *DeCoteau* v. *District County Court*, 420 U.S. at 427 & n.2 (same). As DOI correctly concluded at the time, the Village's acquisition of fee title to the land under ANCSA did not in any way restore the land's reservation status, or permit DOI to hold it in trust. *See supra* at 11.

Moreover, respondents did not "opt out" of ANCSA, but rather simply selected a particular benefits option available *under* ANCSA. As DOI concluded when the Village of Venetie put the same argument to it in 1980, any suggestion that Section 1618(b) permitted occupants of a former reserve to "disassociate[] themselves from the settlement" fundamentally misconstrues the purpose and effect of that provision:

"[ANCSA] does not contemplate the further acquisition of land in trust status, or the holding of land in such status, in the State of Alaska." 45 Fed. Reg. 62034 (Sept. 18, 1980). ANCSA lands are accordingly expressly excluded from the Secretary's rules authorizing the acquisition of Indian lands by the federal government in trust. 25 C.F.R. § 151.1 (1997).

[22] Under Section 1618(b), village corporations established pursuant to ANCSA whose stockholders had resided on former reserve lands were permitted to elect to receive title to that land in lieu of the other benefits under the Act. 43 U.S.C. § 1618(b).

> The option contained in Section [1618(b)] was * * * designed to avoid the hardship which would result if [the reservation] Natives were forced to select land elsewhere, or a lesser total acreage. * * * The structure and legislative history of Section [1618] itself precludes the restoration of former reservations to trust status. Section [1618] * * * does not allow Natives to vote for continued trust status. It merely allows them to choose between two forms of compensation in settlement of their claims. [J.A. 145-146.]

c. Accordingly, neither Section 1618(b) nor Venetie's former reserve status provides any basis for treating the land at issue in this case any differently from the tens of millions of acres of other Alaska land conveyed as part of the settlement. Except, that is, in this important respect: of all the land conveyed under ANCSA, former reserve land is the *least* likely candidate for Indian country status, since by virtue of Congress' express revocation of the land's reservation status, there can be no question whatsoever that Congress did not intend for that land to be a reservation or—as the other provisions discussed above underscore—anything like one. Rather, Congress had something altogether different in mind. The Native Village of Venetie disagrees with that approach—and has tried repeatedly to circumvent it—but neither the Village nor the courts are free to disregard the clear intent of Congress that land conveyed under the settlement not be Indian country.[23]

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[23] Section 1603(c) of ANCSA sweeps even broader than the Act's explicit revocation of existing reserves, expressly "extinguish[ing]" "[a]ll claims * * * that are based on claims of aboriginal right, title, use, or occupancy of land * * *, or that are based on any statute or treaty of the United States relating to Native use and occupancy * * *." 43 U.S.C. § 1603(c). Section 1151—the federal Indian country statute—plainly "relat[es] to Native use and occupancy." *Id.* Therefore, as Judge Fernandez concluded, Section 1603(c) "disassociated the land from all other claims, including Indian country claims" based on Section 1151. Pet. App. 34a.

B. ANCSA Does Not Set Apart Land For The Use Of Indians As Such, Under The Superintendence Of The Federal Government.

1a. The same conclusion follows under this Court's general "Indian country" rule, which asks whether the land is "validly set apart for the use of the Indians as such, under the superintendence of the Government." *Oklahoma Tax Comm'n* v. *Potawatomi Tribe*, 498 U.S. at 511 (internal quotation marks omitted). In every one of this Court's cases in which the requisite "set aside" has been found, Congress had specifically designated the land as "Indian country," *Sandoval*, 231 U.S. at 37, a "reservation," *John*, 437 U.S. at 648; *Pelican*, 232 U.S. at 449; *Donnelly*, 228 U.S. at 269, its equivalent, *McGowan*, 302 U.S. at 537 & n.4, or "trust land," *Potawatomi Tribe*, 498 U.S. at 511. In ANSCA, Congress did nothing of the sort. Indeed, rather than "set[ting] apart [the land] for the use of the Indians *as such*," 498 U.S. at 511 (emphasis added), it expressly revoked any existing reserves or trusteeship, and provided for the conveyance of the land to state-chartered business corporations to do with as they see fit. *See* 43 U.S.C. §§ 1606(d), 1607(a).

The conveyance of the land to private business corporations—rather than to tribes or individual Natives—was key to ANCSA's express goals of achieving a settlement "in conformity with the real economic and social needs of Natives," "with maximum participation by Natives in decisions affecting their rights and property," and "without establishing any permanent racially defined institutions." *Id.* § 1601(b). And—along with the Act's express revocation of existing reserves and rejection of any trust arrangement—it was one of the principal means through which Congress sought to promote the economic participation of Alaska Natives in American society. *See* DOI Op., p. 82 ("One of ANCSA's most significant departures from the government's past practice in resolving Indian or Native land claims was the choice made to deliver compensation and land title to corporate entities organized

under state law, rather than directly to, or in trust for the benefit of, traditional tribal groups.").

The important distinction between conveying the land to tribes or Natives as such, on the one hand, and to private corporations, on the other, was not lost on Alaska Natives. As AFN's chief counsel testified during the hearings:

> I think some members of the committee may be interested in the unusual features that we have adopted in handling the land and the money. The land and the money * * * will not be given to the villages as tribal entities. Instead, business corporations will be formed by the village members and the land and money will go to these business corporations. *This is very important because it separates the municipal corporation or the native group as a municipal corporation from the native group as a tribal entity.* Otherwise, there is a very real danger that it will freeze the natives to the land and to the villages and make it difficult or impossible for them to be mobile in American society today. [*Hearings on S. 2906, supra*, at 575 (Barry W. Jackson) (emphasis added).]

And, as amicus Shee Atika, Inc. has explained, there are numerous ways in which the ANCSA corporations that own the land are distinct from the tribal entities eligible to participate in the settlement. *See* Shee Atika Br. 6-16.

Significantly, Congress specified that the corporate recipients of the land would be organized under and subject to state rather than federal law, including in the area of taxation. *See, e.g.*, 43 U.S.C. §§ 1606(d), 1606(h)(2), 1607(a), 1613(h)(2), 1620(d). This is telling because —as Congress is presumed to have been aware, *see Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988)—state laws and taxes are generally *inapplicable* within Indian country. *See supra* at 18.[24] Indeed, the

[24] ANCSA's treatment of taxes is especially revealing. Congress expressed its intent in the statute itself to achieve a land settle-

available evidence confirms that Congress made ANCSA corporations subject to state law precisely to preclude any possibility that the settlement lands would be considered reservations.[25]

b. Despite all of this, the Ninth Circuit concluded that ANCSA land was set apart for the use of Indians "as such," because ANCSA corporations are owned by Natives and thus, as the Ninth Circuit put it, have a "Native identity." Pet. App. 15a. There are several problems with this conclusion, among which is that it conflicts with the express intent of Congress to *avoid* creation of "any permanent racially defined institutions." 43 U.S.C. § 1601(b). Indeed, through ANCSA, Congress thought that it had "put an end forever to racial or ethnic distinctions in land tenure * * * or provision of government services in Alaska." S. Rep. No. 91-925, *supra*, at 62. Moreover, if all that were required to meet the set aside requirement were the conveyance of land to an individual

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ment "without adding to the categories of property and institutions enjoying special tax privileges." 43 U.S.C. § 1601(b). Recognizing ANCSA lands as Indian country would of course starkly contravene that intent, because Indian country enjoys a broad exemption from state taxes. *See Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. at 128 ("we presume against a State's having jurisdiction to tax within Indian country"). In addition, ANCSA exempted undeveloped ANCSA land from state and local property taxes for 20 years, 43 U.S.C. § 1620(d)(1)—an action that would have been wholly superfluous if Congress had intended the lands to be sovereign Indian country.

[25] The Chairman of the pertinent House committee, responding to a colleague's request for a "guarantee" that there be "no possibility" that the lands would "be considered at any time in the future as Native reservations or Indian reservations, knowing the tremendous problems that we have because of the Indian reservations in the forty-eight adjacent states," stated that he shared that concern and that the "way that we can do this is to find that these villages, wherever they may be, before they can take, must be incorporated under the laws of the State of Alaska." *Executive Session, Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess. (June 21, 1971) (Ch. Aspinall and Rep. Kyl). In Section 1607(a), Congress did just that.

or entity with a "Native identity," then Congress could never convey land to a Native-affiliated entity or individual without creating Indian country, even when, as here, the creation of sovereign Indian enclaves is precisely the opposite of what it is attempting to accomplish.

In reaching its "set aside" conclusion, the Ninth Circuit also emphasized that ANCSA restricts the alienability of stock in ANCSA corporations. Pet. App. 17a. But the pertinent question is whether the *land*—not the stock in its corporate owner—has been set aside for the use of Indians as such. And while the alienability of stock in ANCSA corporations may—at least as a temporary matter—be restricted,[26] the alienability of ANCSA land—as even the Ninth Circuit felt obliged to concede, Pet. App. 17a— is *not*. *See Capener* v. *Tanadgusix Corp.*, 884 P.2d 1060, 1074 (Alaska 1994); Cohen, *supra*, at 747 ("An important feature of ANCSA is that all lands selected by Native corporations are patented in fee simple with few restrictions on alienation"); Shee Atika Br. 18 n.49 ("ANCSA corporations are as free as any other private owners to dispose of their lands").[27] The free

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[26] ANCSA barred the sale of members' stock in ANCSA corporations for a period of 20 years from the date of the Act. 43 U.S.C. §§ 1606(h), 1607(c). (That period was later changed to 20 years from the date of conveyance of land to the ANCSA corporations, after which corporations may elect to provide for the alienability of their stock. *See id.* § 1629c.) ANCSA did not, however, prevent non-Natives from owning stock in ANCSA corporations. Non-Natives could become non-voting stockholders through inheritance or by acquiring stock through court orders in divorce or child support proceedings. *See id.* § 1606(h).

[27] Since ANCSA's enactment numerous ANCSA corporations—including, of course, the Venetie and Arctic Village corporations—have sold, swapped, or conveyed valuable ANCSA lands to others, including to non-Native individuals and entities. *See, e.g., Village Journey, supra*, at 99; *Spill Trustees OK $89 Million Kodiak Deals*, Anchorage Daily News, Nov. 4, 1994, at E1 (ANCSA corporations received $60.5 million for sale of 237,000 acres of land and related property rights); *Land Baron Publicity-Shy Mississippian Has Lock on Anchorage Lots*, Anchorage Daily News, June 30, 1991, at

alienability of ANCSA land—to Natives *or* non-Natives—alone compels the conclusion that Congress did not set aside the land for the use of Indians as such.[28]

c. There is no reason to treat the Venetie tract any differently. As DOI itself found with respect to Venetie, "[t]he Government's conveyance of former Venetie Reserve lands to the ANCSA entities in fee was a conveyance to Village corporations, *not* to tribes." J.A. 152 (Letter from S. Keep, Acting Assoc. Solicitor, DOI, to P. Williams, First Chief, Native Village of Venetie, *et al.* (Dec. 23, 1980) (emphasis added)). The corporate entities subsequently conveyed the land to the Village, but, as the District Court found, that act was not a *federal* set aside; it was the "voluntary act" of state-chartered corporations, "not joined in nor approved by the federal government." Pet. App. 75a. *See id.* 77a-79a.

The decision to create Indian country is emphatically one for Congress to make. *See McGowan*, 302 U.S. at 538; *Sandoval*, 231 U.S. at 46; *supra* at 18-19, 21-22. Thus, as the Tenth Circuit recently explained, Indian tribes do not have the authority to

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C3 (ANCSA corporation sold 270 acres of land to Sunrise Development Corp.).

[28] Indeed, as even the Ninth Circuit acknowledged (*see* Pet. App. 8a-9a), the fact that the Village—and not the federal government—owns fee title to the land at issue calls for the conclusion that the land is not Indian country under the "dependent Indian community" test applied in the other circuits. *See, e.g., Penobscot Indian Nation* v. *Key Bank of Maine*, 112 F.3d 538, 547 n.12 (1st Cir. 1997) (existing authorities "indicate that 'Indian Country' * * * encompass[es] Indian trust lands but not Indian fee lands"), *pet. for cert. filed*, No. 97-219 (Aug. 4, 1997); *United States* v. *Adair*, 111 F.3d 770, 776 (10th Cir. 1997) (no dependent Indian community where "the federal government has not retained title to the land * * * nor has it retained regulatory or protective legal authority over the area"); *United States* v. *Stands*, 105 F.3d 1565, 1572 (8th Cir. 1997) ("fee land beyond the boundaries of a reservation is not Indian country"), *pet. for cert. filed*, No. 96-9316 (June 5, 1997); *Narragansett Indian Tribe*, 89 F.3d at 920-921 ("in most of the cases we found where land was privately held, even if by a tribe, the courts found there was not a dependent Indian community") (citing Eighth and Tenth Circuit cases).

> remove land from state jurisdiction and force the federal government to exert jurisdiction over that land without either sovereign having any voice in the matter. Nothing in *McGowan* or the cases concerning trust land indicates that the Supreme Court intended for Indian tribes to have such unilateral power to create Indian country. [*Buzzard* v. *Oklahoma Tax Comm'n*, 992 F.2d 1073, 1077 (10th Cir.), *cert. denied*, 510 U.S. 994 (1993).]

Accord Narragansett Indian Tribe, 89 F.3d at 922. The rule is no different under ANCSA. *See* DOI Op., p. 122 ("The ANCSA statutory scheme simply does not permit tribes to create Indian country in Alaska by unilateral action, nor by virtue of * * * tribal ownership to impose federal restrictions on the land that Congress in ANCSA sought to avoid.").

Accordingly, the unilateral decision of the ANCSA corporations to convey the Venetie tract to the Native Village of Venetie—as opposed to some other bidder—could not and did not transform the land into Indian country.

2a. The requisite federal superintendence is also lacking. In every case in which this Court has found such superintendence the land at issue—having been expressly set aside as a reservation or its equivalent—was under the jurisdiction and control of the federal government.[29] Thus, for example, in *McGowan* the Court held that the land was "under the superintendence of the Government," because "[t]he Government retain[ed] title to the lands which it permits the Indians to occupy." 302 U.S. at 539. And in *Pelican* the Court emphasized that "the lands * * * were to be held in trust by the United States," and "[t]hat

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[29] While we discuss the "set aside" and "superintendence" requirements separately, this Court has said that to be Indian country land must be set aside *under* federal superintendence. *See supra* at 24. Thus, it is not enough to have a set aside without the requisite superintendence; indeed, it is not at all apparent that one could exist without the other. In any event, under ANCSA it is clear that *neither* requirement is present.

the lands, being so held, continued to be under the jurisdiction and control of Congress for *all* governmental purposes, relating to the guardianship and protection of the Indians." 232 U.S. at 447 (emphasis added). *See also Sandoval*, 231 U.S. at 37 n.1 (land placed under " 'absolute jurisdiction and control of the Congress of the United States' ") (quoting statute).

In addition, in the cases in which this Court has found superintendence, the federal government was not simply a presence in the lives of the Native occupants of the land, but rather by statute had expressly assumed jurisdiction and control over virtually all facets of the community in order directly to supervise, protect, and, indeed, sustain the Indians residing there. Thus, the government sent "agents and superintendents" directly to the Pueblo communities at issue in *Sandoval* to "guard[] their interests" because, in its view, the Pueblo Indians were "dependent upon the fostering care and protection of the Government, like reservation Indians in general." 231 U.S. at 40-41. And the government established the "Indian Colony" in *McGowan* to create a "permanent settlement" for "needy Indians"—who were "liv[ing] just from hand to mouth" with "no protection whatever"—and undertook "to equip and supervise these Indians." 302 U.S. at 537 & n.5 (internal quotation marks omitted).

b. ANCSA is flatly inconsistent with such notions of Indian dependence and federal superintendence. Indeed, the "basic purpose of the legislation is to give Alaska Native[] people the tools for making their *own* decisions, and the funds and expertise for carrying out their *own* programs." S. Rep. No. 91-925, *supra*, at 90 (emphases added). *Accord* 43 U.S.C. § 1601(b); S. Rep. No. 92-405, *supra*, at 108. Thus, the ANCSA Congress eliminated any reservation or trustee relationship with the land and conveyed it in fee simple to state-chartered corporations, to do with as they please. *See supra* at 27-31, 35-38.[30] And,

[30] *See also* H.R. Rep. No. 92-523, *supra*, at 9 (ANCSA "corporations will be organized under State law, *and will not be subject to Federal supervision* except to the limited extent specifically provided in the bill.") (emphasis added); Federal Field Committee for Development Planning in Alaska, *Alaska Natives and the Land* 546 (1968) (Native leadership preferred that "the management responsibility be given to the people rather than to the Department of the Interior").

as the Ninth Circuit itself acknowledged, "[t]oday, Venetie owns its land in fee simple, and the federal government exercises few controls (if any) over Venetie's territory." Pet. App. 29a. That hardly bespeaks of federal superintendence.

ANCSA not only relinquished federal jurisdiction and control over the land, it did so in favor of the *State*. Thus, to receive land under the settlement Congress required Native villages—including Venetie—to form corporations that were creatures of and subject to state law. *See* 43 U.S.C. §§ 1606, 1607. In addition, Congress encouraged those Native villages that did not already have them to adopt municipal governments under state law. *See id.* § 1613(c). That approach was of course entirely consistent with the fact that Alaska Natives—unlike reservation Indians in the lower 48 States—had historically been subject to the same territorial and state laws as non-Natives. *See supra* at 5-7.

The express intent of Congress to place the land under the primary control of state and local authorities—not federal superintendents—also conformed with the wishes of Alaska Natives, who were "trying to get *away* from the BIA, frankly, and from the Secretary of the Interior and accomplish a transition into American society to preserve for Indians as well as for the whites the mobility which exists in American society today." *Hearings on S. 2906, supra*, at 90 (emphasis added). As former Justice Arthur Goldberg—who represented AFN during the hearings—put it, "[p]aternalism [was] neither required nor wanted." *Hearings on H.R. 13142, supra*, at 189.

c. Against this backdrop, the Ninth Circuit found federal superintendence in the fact that Alaska Natives

participate in what the court itself termed simply a "patchwork of benefit programs." Pet. App. 22a. That conclusion speaks volumes about the Ninth Circuit's superintendence inquiry. Indians and tribal organizations across the United States—like myriad other individuals and groups—are eligible for participation in any number of federal benefits programs, not all of which are tied to their Indian status; their participation in such programs does not establish federal superintendence over their land or communities, and thus does not transform their land or homes into Indian country.[31]

As this Court's precedents establish—and as virtually all of the federal circuits that have considered the matter but the Ninth have held—federal superintendence requires active, pervasive federal jurisdiction and control over the land, sufficient to confirm not only that the federal government has purposely undertaken to guard, protect, and sustain the community, but to displace state law and local authorities in doing so.[32] The focus on Congress' intent to

[31] The Ninth Circuit recognized Congress' intent that the ANCSA corporations "'not be subject to Federal supervision,'" Pet. App. 23a (quoting H.R. Rep. No. 92-523, *supra*, at 9), but concluded that "subsequent legislative action belies this intention," referring to Congress' decision to make Alaska Natives eligible for various programs benefiting Indians. Pet. App. 23a. Although the extension of such benefits does not amount to federal superintendence, or establish the Natives' dependency, the manner in which Congress extended such benefits provides still additional evidence that it does not regard ANCSA lands as Indian country. Eligibility for such benefits is often established by cross reference to 18 U.S.C. § 1151. Congress has recognized, however, that tying benefits to Section 1151 would exclude Alaska Natives, because they do not occupy Indian country. As a result, when benefits are extended based on reference to Section 1151, Congress has included an additional reference to ANCSA lands when it wants such benefits to reach Alaska Natives. *See, e.g.*, 25 U.S.C. §§ 1452(d) (entitlement to benefits under Indian Financing Act of 1974), 1903(10) (eligibility for tax benefit under Internal Revenue Code).

[32] *See supra* at 20-23 (discussing *Sandoval* and *McGowan*); *United States* v. *Adair*, 111 F.3d at 776-777 & n.7 (fact that inhabitants of area "are eligible for a variety of federal or tribal services" does not establish superintendence because there was no indication that the federal government had assumed "control or authority over the area as a whole"); *Narragansett Indian Tribe*, 89 F.3d at 922 (federal government's "intent to assist" members of Indian community does not establish "a commitment to exercise jurisdiction and 'superintendence' over all activities on th[e] land * * * to the presumptive exclusion of state law"); *Buzzard*, 992 F.2d at 1076 (superintendence lacking because "federal government has not retained title to th[e] land or indicated that it is prepared to exert jurisdiction over the land"); Pet. App. 65a (District Court).

assume such a role is critical because, as discussed, the practical effect of recognizing Indian country is to displace state jurisdiction over important regulatory matters and, in most States (though not Alaska, which is among the Public Law 280 States), over serious criminal conduct as well. *See supra* at 18.

d. As is readily apparent, the federal government's involvement in the lives of Alaska Natives is entirely different than its involvement with respect to the "dependent Indian communities" in *Sandoval* and *McGowan*. Indeed, as explained, the history of Alaska Natives is, if anything, one of *independence*, not superintendence. Alaska Natives were never categorically displaced from their land and confined to federal enclaves. Since the Treaty of Cession, many Alaska Natives have participated in and contributed to Alaska's economy, and those that have not have largely managed to live off the land and its resources, which—unlike the American west—remain largely capable of supporting such a lifestyle even today. *See supra* at 4-6. Thus, while Alaska Natives are eligible for and have participated in various federal programs, they have never been entirely dependent upon or subject to the superintendence of the federal government. To the contrary, from the Alaskan purchase to statehood, "the federal government was involved only *minimally* with Alaska Natives." Cohen, *supra*, at 739 (emphasis added).

Moreover, as the District Court found—and even the Ninth Circuit acknowledged—ANCSA fundamentally al-

tered the manner in which the federal government *is* involved in the lives of Alaska Natives in a fashion that forecloses any finding of superintendence today. *See* Pet. App. 28a ("Undoubtedly, the practice of federal agencies toward Venetie has changed since ANCSA was enacted in 1971. In many respects, the federal government has been replaced by either the State or the Tribe itself as the direct provider of services.") (Ninth Circuit); *id.* 66a-67a (after ANCSA, federal assistance is "now available in the form of grants and other programs which are administered by Native people themselves with general oversight by agencies as opposed to direct agency services to the tribe.") (District Court). In short, where the federal government's presence has faded after ANCSA, the State's has become more pronounced. *See* Br. for State of Alaska, pp. 44-48 (9th Cir.) (detailing involvement of State in day-to-day affairs of Native villages, including Venetie, in areas such as health, education, public works, and law enforcement).

Thus, as DOI has concluded, "[t]he present relationship between ANCSA-conveyed Native landholdings and the Federal government, particularly in light of the express language in ANCSA rejecting lengthy wardship or trusteeship, cannot be characterized as a guardianship or as related to a trust." DOI Op., p. 121.

e. Finally, in holding that Congress intended "to maintain federal superintendence over Alaska Natives," Pet. App. 21a, the Ninth Circuit also emphasized that "Congress declared that ANCSA did not 'relieve, replace, or diminish any obligation of the United States or of the State or [sic] Alaska to protect and promote the rights or welfare of Natives * * *.'" *Id.* (quoting 43 U.S.C. § 1601(c) (ellipses in Ninth Circuit opinion)). *See* Pet. App. 3a (same). Significantly, however, the Ninth Circuit omitted the most telling language of the quoted provision, which—in place of the ellipses—continues "as *citizens* of the United States or of Alaska." 43 U.S.C. § 1601(c) (emphasis added). In other words, the federal obligation recognized under ANCSA did not concern Alaska Natives

as "dependent wards," *Sandoval*, 231 U.S. at 45—or "Indians as such"—but rather as ordinary "citizens" of the land in which they live. That makes perfect sense in light of the unique history of the involvement of Alaska Natives in civic affairs, and it too belies any suggestion that Congress sought to establish or retain any federal superintendence over Alaska Natives under ANCSA.[33]

III. THE JURISDICTIONAL AND PRACTICAL CONSEQUENCES OF RECOGNIZING INDIAN COUNTRY IN ALASKA COUNSEL AGAINST ANY JUDICIAL DESIGNATION OF ANCSA LAND AS INDIAN COUNTRY.

1a. The enormous jurisdictional and practical consequences of thrusting a brand new Indian country regime upon Alaska also counsel in favor of rejecting the Ninth Circuit ruling. All 44 million acres of land conveyed pursuant to ANCSA—dispersed in a buckshot fashion throughout the State, *see* Pet. App. 173a (map)—qualify for claims of Indian country status under the Ninth Circuit decision. As Judge Fernandez observed below, the decision accordingly invites "a blizzard of litigation throughout the State * * * as each and every tribe seeks to test the limits of its power over what it deems to be *its* Indian country," asserting "claims to freedom from state taxation and regulation, claims to regulate and tax

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[33] None of the subsequent amendments to ANCSA alters the clear intent of the 1971 Congress that ANCSA land *not* be Indian country, or transforms ANCSA land *into* Indian country. *See Hagen* v. *Utah*, 510 U.S. at 420 ("Because the textual and contemporaneous evidence of diminishment is clear, * * * the subsequent legislative record does nothing to alter our conclusion that the Uintah Reservation was diminished"); DOI Op., pp. 94-95 ("none of [the subsequent amendments to ANCSA] evince any purpose to alter the fundamental scheme established by the Congress in the original 1971 Settlement Act"). Indeed, the amendments on which respondents most heavily rely—originating in 1987—explicitly disavow any purpose to interfere with the intent of the 1971 Congress on the question of Indian country. *See* Pub. L. No. 100-241, § 17(a)(2), 101 Stat. 1814, 43 U.S.C. § 1601 note; Opp. 25-27; Reply to Opp. 10 n.10.

for tribal purposes, assertions of sovereignty over vast areas of Alaska, and even assertions that tribes can regulate and tax the various corporations created to hold ANCSA land." Pet. App. 35a (emphasis added).

The courts will be called upon to resolve these claims in the innumerable instances in which they may arise, subjecting the boundaries and extent of state jurisdiction to exercise fundamental government powers to hundreds of case-by-case determinations. Congress surely did not intend that result when it sought through ANCSA to settle Native claims "rapidly, with certainty, * * * [and] without litigation." 43 U.S.C. § 1601(b). Indeed, as Judge Fernandez observed: "There are hundreds of tribes, and the litigation permutations are as vast as the capacity of fine human minds can make them." Pet. App. 35a. Sorting all this out will be a time-consuming, expensive, and divisive endeavor—especially in light of the Ninth Circuit's indeterminate, multi-factor analysis for finding Indian country.

The resulting confusion and uncertainty over basic questions of governmental authority and operations itself provides a compelling reason to reject the Ninth Circuit Indian country regime. *See Brendale* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 425 & n.8 (1989) (opinion of White, J.) (rejecting holding that would create "uncertainty" due to "the necessarily case-by-case determination of which regulatory body (or bodies) has * * * jurisdiction over [certain] land, not to mention the uncertainty as to when a tribe will attempt to assert such jurisdiction"). On the other hand, if (as Congress quite clearly intended) ANCSA land is not Indian country, then the long-standing jurisdictional regime and settled understanding in Alaska—in which state laws apply to all Alaskans, without regard to the particular community in which they live—will simply remain intact.

b. As Judge Fernandez observed—and as the Native Village of Venetie itself has argued—another result of the decision below is that it vests tribes occupying ANCSA

land with newfound taxing authority, including "the power to tax and regulate the myriad of private corporations which received land under ANCSA." Pet. App. 35a. This not only gives Native villages the ability "to control, regulate, and tax those corporaitons out of existence," but "provide[s] a fruitful area for *intertribal* conflict." *Id.* (emphasis added). Such efforts would—in plain derogation of Congress' intent—gut ANCSA's hallmark corporate governance scheme, providing a graphic illustration of Chief Justice Marshall's famous maxim. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819) ("[T]he power to tax involves the power to destroy."). As amicus Shee Atika, Inc.—an ANCSA corporation—has warned, this threat is real, not imagined. Shee Atika Br. 26.

The practical consequences of the Ninth Circuit ruling on the regulatory front are no less severe. Alaskans sought statehood in significant part to gain control of the virtually unparalleled natural resources in that State, especially fish and game. Indeed, Alaskans went so far as to ensure protection for these resources in their constitution, Alaska const. art. VIII, § 4, and since statehood have enacted a comprehensive regulatory scheme to preserve them. Alaska Stat. tit. 16; Alaska Admin. Code tit. 5. If ANCSA land is transformed into Indian country, the State's ability to regulate hunting and fishing in numerous important game areas will be restricted, or possibly even precluded altogether.[34] Moreover, because ANCSA land is dispersed throughout the State, and wildlife migrates without regard to jurisdictional boundaries, the Ninth Circuit ruling will prevent implementation of an effective, state-wide fish and game management scheme. Certainly, none of this was intended by ANCSA; that Act

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[34] *See, e.g., New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 327 & n.4, 329, 344 (tribal hunting and fishing rules preempted state law, even as to non-Indians, with respect to "package hunts" and other sporting activities in Indian country); *Montana* v. *United States*, 450 U.S. at 557 (tribes may bar non-members from hunting or fishing on Indian country, or "condition their entry by charging a fee or establishing bag and creel limits").

expressly extinguished "any aboriginal hunting and fishing rights that may exist." 43 U.S.C. § 1603(b).

Other important state regulatory programs are also at risk, including those concerning land use. Congress contemplated that "most of [the ANCSA land] will be selected for its *economic* potential." H.R. Rep. No. 92-523, *supra*, at 5 (emphasis added). Developing that land implicates numerous state laws and regulations. For example, numerous ANCSA corporations harvest valuable timber on their land. *See* Shee Atika Br. 27. In order to inhibit erosion and protect wildlife such as salmon, the State's Forest Practices Act prohibits harvesting timber on private land within close proximity to streams and other bodies of water, *see* Alaska Stat. § 41.17.116-118; there is no comparable provision of federal law. If ANCSA land is Indian country, such state regulation may be thwarted. *See* Pet. 15-16 (discussing other programs). As in the case of fish and game, moreover, the haphazard nature in which ANCSA land is dispersed throughout the State will—if that land is deemed Indian country—hinder implementation of any effective statewide regulatory scheme. Efforts to protect a salmon stream are futile if long stretches along the stream are exempt from regulation.

c. Transforming ANCSA land into Indian country also would create a startling anomaly due to the enormous—even to this day—federal land holdings in Alaska, and comparatively small state and private holdings. All told, there are some 365 million acres of land in Alaska. Until 1958 the land was owned by the federal government. Under the Statehood Act, Alaska was permitted to select 103 million acres of land. ANCSA conveyed 44 million acres of land to ANCSA corporations from existing federal holdings. This land accounts for at least 97% of all privately held land in the State. *Village Journey*, *supra*, at 143. After granting Alaska statehood, Congress surely did not mean to leave the State with full regulatory and taxing authority over only a tiny fraction—less than

3%—of all privately held land in the State (which, of course, constitutes a miniscule portion of all land in the State). Yet, if the land conveyed under ANCSA is Indian country, that is precisely what the State is left with.

d. Congress deliberated on ANCSA for more than four years. It conducted lengthy hearings on the Act, at which scores of State, Native, and federal officials and other witnesses testified about all facets of the settlement, and it produced numerous committee reports explaining the settlement. *See* 117 Cong. Rec. S11301 (daily ed. July 14, 1970) (Sen. Gravel) ("[T]here has been no bill in the history of the Committee on Interior and Insular Affairs which has demanded more in time, more in attention, and more in effort on the part of a chairman and on the part of the committee itself than this one."). Yet the legislative record of ANCSA contains no discussion of the obvious jurisdictional and practical consequences of treating ANCSA land as Indian country. That silence is deafening, especially in light of the *express* intent discussed above. *See Chisom* v. *Roemer*, 501 U.S. 380, 396 n. 23 (1991) (" 'In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night' ") (quoting *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting)); *Church of Scientology of California* v. *IRS*, 484 U.S. 9, 17-18 (1987) (same).

2. Finally, it bears repeating that judicial designation of ANCSA land as Indian country will have the effect of establishing a gigantic reservation system in Alaska, nearly doubling the total area of Indian country nationwide. History and geography have spared Alaska and its Natives any such system thus far and, in ANCSA, Congress—at the urging of Alaska Natives and others—expressly repudiated the adoption of any such system as part of the final settlement of aboriginal claims. *See* 43 U.S.C. §§ 1601(b), 1618(a). The courts should not now im-

pose that repudiated regime on the State of Alaska by way of an expansive and indeterminate "dependent Indian community" test, such as the one fashioned and applied by the Ninth Circuit below.

* * * *

The nineteenth and early twentieth century history of dealings between the federal government and the Indians in the lower 48 States has left in its wake a decidedly mixed legal legacy, including the concept of a "dependent Indian community" itself, with its roots in outdated notions of cultural superiority. As the drafters of ANCSA recognized, Alaska—the Nation's last frontier—provided an opportunity for a new approach, one freed from outworn entanglements with a federal Indian policy shaped by the demands of a different time and place. Congress in ANCSA seized that opportunity and made clear its intent that ANCSA land not be Indian country, or anything like it. This Court should give effect to that intent.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Ninth Circuit below.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF ALASKA,

Petitioner.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

In 1943, the Secretary of the Interior set aside a 1.8 million acre reservation in Alaska (less than one-half of one percent of the State's land area) to protect the hunting grounds of the Natives of Venetie and Arctic Villages ("Venetie Reservation"). Unlike almost all other Native villages in Alaska, the Natives of Venetie and Arctic Villages elected under section 19(b) of the 1971 Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601, 1618(b) ("ANCSA"), to acquire title to their existing reservation and thereby to forego any other land or economic benefits under the Act. The question presented is:

Whether the Ninth Circuit correctly held, based on the complete absence of language in ANCSA extinguishing Indian country in Alaska, that the Native Village of Venetie Tribal Government (which represents both Venetie and Arctic Villages) occupies Indian country and retains its inherent authority to tax business activities occurring within its territory in order to provide essential governmental services in an area not served by any other local government.

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117 Cong. Rec. 38,445 (1971) 17
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President's Special Message to Congress on Indian Affairs, Pub. Papers 564-76 (1970) 15, 16

OTHER AUTHORITIES:

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H. Anderson and W. Eells, *Alaska Natives: A Survey of their Sociological and Educational Status* (1935) 7
R. Arnold, *Alaska Native Land Claims* (1978) 13
G. Biggs, *Is There Indian Country in Alaska?,* 64 Colo. L. Rev. 849 (1993) 47
D. Blurton, *ANCSA Corporation Lands and the Dependent Indian Community Category of Indian Country,* 13 Alaska L. Rev. 211 (1996) 47
Brief of *Amici* Native Village of Tanana et al. filed in *Blatchford v. Noatak,* 501 U.S. 775 (1991) 11, 15
D. Case, *Alaska Natives and American Laws* (1987) 7, 9, 11
R. Clinton et al., *American Indian Law* (3d ed. 1991) 33
R. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze,* 18 Ariz. L. Rev. 503 (1976) 37, 38
Federal Field Committee for Dev. & Planning in Alaska, *Alaska Natives and the Land* (1968) 15
Felix S. Cohen's Handbook of Federal Indian Law (R. Strickland et al. eds. 1982 ed.) ..... *passim*
Handbook of North American Indians (Arctic) (D. Damas vol. ed., 1984) 7
Handbook of North American Indians (Subarctic) (J. Helm vol. ed., 1981) 7
S. Harring, *Crow Dog's Case* (1995) 9

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D. Miller, *The Alaska Treaty* (1981)	8
D. Niedermeyer, Note, *"The True Interests of A White Population:" The Alaska Indian Country Decisions of Judge Matthew P. Deady*, 21 NYU J. of Int'l L. & Pol. 195 (1988)	9
E. Smith and M. Kancewick, *The Tribal Status of Alaska Natives*, 61 Colo. L. Rev. 455 (1990)	8, 9
P. Thompson, *Recognizing Sovereignty in Alaska Native Villages After the Passage of ANCSA*, 68 Wash. L. Rev. 373 (1993)	47
J. Walsh, Note, *Settling the Alaska Native Claims Settlement Act*, 38 Stan. L. Rev. 227 (1985)	47

INTRODUCTION

Nearly 800 miles north of Alaska's capital–above the Arctic Circle at the foot of the Brooks Range in a land as wild as any area in America–is the homeland of the Venetie Tribe of Neets'aii Gwich'in Indians. The Venetie people have governed, hunted and fished their land since time immemorial according to ancient tribal customs and traditions, in a society where children still speak Gwich'in as a first language and life still largely follows the migratory rhythms of caribou and salmon.

All of the Venetie area lands, a former reservation set apart for the Tribe, are owned by the Tribe in communal fee. All of the permanent residents are Venetie tribal members. But for a few school teachers, the only government employees are tribal employees. The Venetie Indians receive the same special Federal Indian Health Service (IHS) and Bureau of Indian Affairs (BIA) programs (among others) available exclusively to reservation tribes, including support for their tribal council and tribal court, employment assistance, financial assistance, vocational assistance, housing assistance, road maintenance and construction, and comprehensive health care. These and other Federal programs are administered either by the Tribe itself or by intertribal organizations authorized by the Tribe to do so.

Petitioner necessarily agrees that Venetie is a federally recognized tribe, whose existence as a sovereign operates independently of whether its lands are technically a reservation. Pet. Br. 7 n.6, 12-13. Nonetheless, and despite the Tribe's supervision of all activities and persons within its territory, Alaska now argues that Venetie somehow lost its territorial jurisdiction over lands which today it exclusively owns and occupies.

To do this Alaska invents a false syllogism that renders much of its argument a diversion: State law is precluded in "Indian country;" state law has been generally applied in village Alaska; therefore, Venetie cannot occupy "Indian country." The State's recitation of both history and "Indian country" law is untenable. It is also largely beside the point.

This case concerns only the Venetie Tribe's authority in its tribal homeland to require that a company using lands owned

by the Tribe, whose activities both substantially burden and benefit from the tribal community, pay a local tax for the privilege of doing business on that tribal land. It does not, and never has, concerned whether the Tribe's jurisdiction is or is not concurrent with that of the State. Indeed, Venetie has readily conceded much of its jurisdiction is concurrent. Resp. Opp. to Cert. 13-14. As this Court's precedents attest, the status of tribal jurisdiction over Venetie's tribal lands–*this* case–is an entirely different question from the extent of State jurisdiction over that same area.

No other issue is implicated in this case. The decision below does not challenge the little state criminal law enforcement that reaches Venetie. It does not raise "uncertainty over basic questions of governmental authority and operations" in Venetie, Pet. Br. 46, for Venetie has always and without interruption governed its own affairs and those who come on to its lands. It does not encourage any other tribe to tax its own economic engine (its village corporation) "out of existence," for all the lands in question here are owned by the Tribe. It does not affect the State's tax revenues. It does not resurrect extinguished hunting and fishing rights. It does not jeopardize Alaska's generous 103 million acre land grant. It does not lead to some unpredictable expansion of Indian country beyond the conservative bounds already long established by all Circuits to have considered the matter. And it does not open the door to the creation of "Indian country" enclaves anywhere a tribe acquires land; as is the case here, the land *by definition* must be a part of a federally recognized tribe's home "community" and be treated as such by Congress.

COUNTER STATEMENT OF THE CASE

Factual and procedural background below

1a. The issue in this case comes as the last vestige of a prolonged controversy in which Alaska has vigorously contested the status of respondent as a federally recognized sovereign tribe

possessing inherent powers of self-government.[1] The following factual account is drawn primarily from the findings of the district court which the circuit court "accept[ed]...without objection." Pet. App. 26a n.5. Respondent Native Village of Venetie Tribal Government ("Tribe") is the federally recognized governing body of the Neets'aii Gwich'in, an Athabascan Indian tribe of some 350 enrolled members in 99 households who reside primarily in the two "distinctly native villages" of Venetie and Arctic Village. Pet. App. 109a, 124a; J.A. 124.

In 1938, the Neets'aii petitioned the Secretary of the Interior to set aside a portion of their vast aboriginal lands in Alaska as a reservation to protect their exclusive use and occupancy of the land. Pet. App. 115a; J.A. 107-122. Pursuant to a Secretarial election held under the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. §§ 461-494 (1948) *et seq.*, the Neets'aii ratified a constitution on January 25, 1940 and in 1943 the Secretary, acting under §§ 467, 473, 473a, withdrew the requested 1.8 million acre Venetie Reservation. Pet. App. 2a, 110a; J.A. 135-141. The Tribe's federally approved Constitution lists among its powers the rights "to stop any giving or taking away of Village lands or other property without its consent," and to "control the use by members or nonmembers of any reserve set aside by the Federal Government for the Village and to keep order in the reserve." J.A. 127. There are no non-Native communities within the Venetie territory, and the "Venetie [Reservation area], in particular, is not materially different today . . . from what it was when first observed [by non-Indians] in the early 1900s." Pet. App. 124a. All but a few residents of the area are Neets'aii tribal members.

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[1] This case was consolidated for trial with an earlier case concerning Alaska's refusal to accord full faith and credit to Venetie's and a neighboring tribe's tribal court orders, in violation of 25 U.S.C. § 1911(d). *Native Village of Venetie I.R.A. Council v. Alaska*, No. F86-075Civ. (D. Alaska), *on remand from* 944 F.2d 548 (9th Cir. 1991) *rev'g* 687 F. Supp. 1380 (1988). The cases were severed following the district court's decision of Dec. 23, 1994. Pet. App. 80a. Judgment was entered in the earlier case on Feb. 22, 1995 (declaring respondent a sovereign tribe and requiring Alaska to accord its tribal court decrees full faith and credit). J.A. 93. Alaska did not appeal from the final judgment entered Jan. 30, 1996, J.A. 94.

Id. 63a.

The Tribe governs the lands and people of the Neets'aii Gwich'in Tribe. Pet. App. 113a-121a; J.A. 92 ¶ 10; 85 ¶ 7; 61 ¶ 6; 67-68 ¶¶ 18, 19; 34 ¶ 23; 41 ¶ 7; 37-38 ¶¶ 7, 9; 81-82 ¶¶ 13, 14; 78 ¶ 11; 72 ¶ 10. At the same time, local village councils in each village carry out functions of day-to-day law and order, furnish local utilities, and handle other matters delegated to the village councils by the central Tribal Government. J.A. 92 ¶ 10; 42 ¶ 8; 82 ¶ 15; 68 ¶ 19. Together, the tribal and village councils maintain the peace, enforce the tribal ban on alcohol, and provide for the general welfare of all inhabitants. J.A. 47 ¶ 12; 68 ¶ 20; 81-82 ¶¶ 13, 16.

b. The only state employees in the Tribe's two villages are schoolteachers. Pet. App. 109a. There are no state troopers, judges or magistrates; no state courts, prosecutors or public defenders; and no other state employees. Nor is there any local state-chartered government in the area.

c. The Tribe is a member of Tanana Chiefs Conference, Inc. (TCC), an intertribal consortium of 43 tribes in interior Alaska. J.A. 52, ¶ 7. Partly on its own and partly through TCC, the Tribe administers its share of virtually all federal Indian services available to tribes in Alaska, pursuant to the Indian Self-Determination Act. J.A. 54-57.

d. In the late 1960s the Neets'aii learned of an imminent threat to their Reservation: a proposed land claims settlement which might terminate all reservations in Alaska, and turn over all Native lands to state municipal governments. Pet. App. 116a. The Neets'aii viewed the proposal as a direct threat to their land base. *Id.* In response, the Tribe successfully sought an amendment that would allow it to retain title to its 1943 Reservation lands.[2]

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[2]Petitioner repeatedly casts aspersions on Venetie's efforts to retain the lands protected by its 1943 Reservation, claiming that at every turn Venetie has been rebuffed. Not so. In 1969, Venetie expressed concern with a bill under which all local lands would have gone to state municipal governments, not tribes or Native corporations. H.R. 91-10193 (1969). The proposal permitted only the Tyonek Tribe of the Moquawkie Reservation to retain its reservation lands. *Id.* § 15. Venetie asked to be treated the same. Ex. 68, Dkt.Nr. 115,

(continued...)

Id.

While the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1618(a), revoked "the various reserves set aside" for Alaska Natives by prior legislation or executive action, § 1618(b) allowed tribes such as Venetie to secure fee title to their former reservation lands in lieu of sharing in the monetary, land, regional corporation, and other provisions and obligations of the Act. On November 10, 1973, the Tribe selected this option, Pet. App. 116a, and decided "against joining in ANCSA other than to take title to their historic lands." *Id.* 119a n.58. The United States then conveyed the Reservation lands in a unitary conveyance to the two village corporations for Arctic Village and Venetie in fee simple as tenants in common. *Id.* 117a. In 1979 the tribal membership, acting through the two village corporations, reconveyed their Reservation lands to the Tribe. *Id.* The two village corporations then dissolved. *Id.* The Venetie Tribe was one of only six Alaska tribes to select the option afforded by § 1618(b) to retain its former Reservation, and it is the only tribe which used its village corporations solely as a vehicle to retain communal fee title to the Reservation in the tribal government.

e. In 1986, pursuant to a duly adopted ordinance imposing a business-activity tax,[3] the Tribe assessed and sought to collect a gross-receipts tax from a private contractor engaged in a school construction project on tribal lands pursuant to a contract with the regional school district.[4] After payment was refused and the

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[2](...continued)
p. 171(tribal resolution asking to be "included as well as the Tyonek Indians...[so as to] give them a chance to make up their minds on keeping or losing their reservation.") In the next Congress, §15 of H.R. 92-10367 (1971), was revised to authorize any reservation tribe to retain its reservation lands, a provision adopted in conference. S. Conf. Rep. 92-581, 46 (1971).

[3] The ordinance was initially adopted in 1978 (Ex.103, Dkt.Nr. 114, p. 104) and was amended in May 1986 (Ex.141, Dkt.Nr. 118, p. 198), the amendments being modeled on the Navajo ordinance upheld in *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985).

[4] In 1982, the Tribe granted a 55-year license to the Yukon Flats School District to occupy and use the high school and grade school sites and related facilities

(continued...)

Tribe brought suit in its Tax Court, the Alaska Attorney General informed the Tribe that the State had agreed with the private contractor to assume responsibility for, and defend against, the Tribe's tax-collection efforts.[5] Ex. 146, Dkt.Nr. 109. Rather than appear and defend in tribal court, the State, on its own behalf and on behalf of the school district and the contractor brought this action in federal court. J.A. 11. The district court granted a preliminary injunction against further tribal enforcement efforts and the Ninth Circuit affirmed, holding that the validity of the tribal tax turned on whether the Tribe is a federally recognized sovereign occupying a "dependent Indian community" within the meaning of 18 U.S.C. § 1151(b). Pet. App. 137a-138a.

f. Following trial and the district court's conclusive judgment that respondent is a sovereign Indian tribe whose judicial *decrees the* State must respect, *supra* at 3, n.1, the court separately concluded that up "[u]ntil 1971... the Neets'aii Gwich'in were

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[4](...continued)
in Arctic Village, and the high school site in the village of Venetie–all located on lands owned in fee by the Tribe. Ex. 124, Dkt.Nr. 109. (The license agreement expressly made the Tribe's 1978 tax ordinance applicable.) In December 1984–in conjunction with the transfer of operation of the Venetie village grade school from the BIA to the school district, and in anticipation of the school construction project underlying the instant controversy–the Tribe entered into a 50-year lease agreement with the school district and the Alaska Department of Education pertaining to additional tribal lands to be used for public school purposes. Ex. 133, Dkt.Nr. 114, p. 102. The Tribe continued to maintain and administer all local government services available to the construction contractor, including the airport, roads, utilities, local law enforcement, garbage disposal, and water and sewage disposal.

[5] The actual agreement between the State and the private contractor concerning ultimate tax liability is not in the record. *See* Ex. 140, Dkt.Nr. 109 (construction contract between contractor and school district, containing no such language). However, the State has alleged throughout this litigation that it assumed liability for the tax. *E.g.*, Pet. Br. ii; J.A. 9-10, 14. Whether such a voluntary assumption of liability shifts the legal incidence of the tax from the private party to the State, *cf. United States v. California*, 507 U.S. 746 (1993); *United States v. New Mexico*, 455 U.S. 720 (1982), or confers upon the State a valid defense to the tax, *cf. Regents of Univ. of Calif. v. Doe*, 117 S. Ct. 900, 903 (1997) ("'[T]he question is not who pays in the end . . . [but] who is legally obligated to pay.'") remains to be explored on remand. Pet. App. 32a.

treated by Congress and the Executive agencies as being subject to active superintendence to such a degree as to amount to a dependent Indian community for purposes of 18 U.S.C. § 1151(b)." Pet. App. 67a. The district court held, however, that ANCSA had implicitly extinguished the Tribe's dependent Indian community status. *Id.* 71a.

g. On appeal, a unanimous panel reversed. It concluded that "ANCSA did not extinguish Indian country in Alaska, and . . . Venetie, having demonstrated that it qualifies as a dependent Indian community, occupies its territory as Indian country." *Id.* 32a. Judge Fernandez wrote separately, expressing unease but concurring in the result that "ANCSA did not eliminate Indian country in Alaska .... I agree that Venetie's territory is Indian country, if any still exists in Alaska." *Id.* 36a. The Court of Appeals remanded, expressly reserving judgment on the validity of the Tribe's tax. *Id.* 32a.

Historical and legal background of Alaska Native Tribes

2a. Alaska is home to 225 federally recognized Native American tribes, including the Venetie Tribe.[6] Like Venetie,

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[6] In 1993, the Federal Government published a list of the 225 Alaska villages recognized as sovereign self-governing tribes, 58 Fed. Reg. 54,364 (Oct. 21, 1993) (republished in 1995 and 1996), a political determination within the exclusive province of Congress and the Executive. *United States v. Holiday*, 70 U.S. (8 Wall.) 407, 419 (1865). (The five states cited for geographic comparison (Pet. Br. 4) contain 189 tribes.) In 1994, Congress ratified the Secretary of the Interior's authority to issue the list. 25 U.S.C. § 479a. Also in 1994, Congress prohibited any federal classification that would diminish "the privileges or immunities [of one or more tribes]...relative to other federally recognized tribes." 25 U.S.C. § 476(f).

As their tribal recognition reflects, Alaska Native villages have governed their communities long before and after the 1867 Alaska Purchase. *See, e.g.*, H.D. Anderson & W.C. Eells, *Alaska Natives: A Survey of their Sociological and Educational Status* 31-50, 144-50 (1935) (commissioned by the U.S. Dep't. of Education in developing 1936 Alaska amendments to the IRA, 25 U.S.C. § 461 *et seq.*); *Handbook of North American Indians* 5(*Arctic*) and 6 (*Subarctic*) (discussing "Gwich'in" or "Kutchin" in v. 6 at 514-24); D. Case, *Alaska Natives and American Laws* 333, 361-62 (1984)("Case")(lodged with Clerk); F. Cohen, *Handbook of Federal Indian Law* 750-52 (1982)("Cohen");
(continued...)

many of these tribes remain in possession of their ancestral lands, governed locally only by their tribal governments.

b. Since the Territory's purchase, Alaska Native tribes have been under the same legal regime applicable to all other Native American tribes. As Article III of the 1867 Treaty of Cession put it: "The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country." 15 Stat. 539, 542, *infra*, 1a. That provision has long been held to apply the whole body of federal Indian and statutory law to the "uncivilized tribes of Alaska." *In re Minook*, 2 Alaska 200, 220-21 (D. Alaska 1904); *see also Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 285 (1955) (noting "no distinction between use of the land [by Alaska Natives] and that of the Indians of the Eastern United States."). As a consequence, courts early on upheld the obligation of the Federal Government–identical to the Government's obligation elsewhere–to eject non-Natives when encroaching on aboriginal village lands. *United States v. Berrigan*, 2 Alaska 442 (D. Alaska 1905); *United States v. Cadzow*, 5 Alaska 125 (D. Alaska 1914); *see also Nagle v. United States*, 191 F. 141, 142 (9th Cir. 1911); *Johnson v. Pacific Coast S.S. Co.*, 2 Alaska 224, 241 (D. Alaska 1904).

The presence of Indian country is not new to Alaska. These rulings, omitted from petitioner's historical review, reflect the contemporaneous understanding of Secretary of State Seward. He advised both President Johnson's Cabinet in 1867 and the Secretary of War in 1869 that Alaska Native tribes, as "dependent nations under the protection of their government," inhabited "Indian country" under the 1834 Indian Trade and Intercourse Act, 4 Stat. 729."[7]

(...continued)
Alaska Natives and the Land (1968) (discussing Gwich'in at 205-07); E. Smith & M. Kancewick, *The Tribal Status of Alaska Natives*, 61 U. Colo. L. Rev. 455 (1990) ("Smith & Kancewick").

[7] D. Miller, *The Alaska Treaty* 71 (1981) (Cabinet memo); H.R. Ex. Doc. 135, 44th Cong. (1876) (War Department analysis and excerpt of Seward 1869 (continued...)

Given this history, Oregon-based Judge Deady's contrary views three years later–spotlighted by petitioner–were a bolt out of the blue. *See United States v. Seveloff*, 27 F. Cas. 1021 (D. Or. 1872) (holding 1834 Act only applied east of the Rocky Mountains). Congress promptly reversed Judge Deady by amending the 1834 Act to specifically apply the "Indian country" liquor control provisions to Alaska. Act of Mar. 3, 1873, ch. 227, 17 Stat. 510, 530. The Army and the Attorney General, too, rejected Judge Deady's views and continued to deal with Alaska as "Indian country" for some time. Harring 215-16. At the same time, federal officials respected the authority of Alaska tribal governments to administer their own affairs.[8] *Id.*

c. In this century both the Executive and Congress have expressed the view that Alaska Native tribes and their members enjoy the same privileges, rights, and immunities as other Native American tribes. By the 1930s (and continuing thereafter) the Department of the Interior resolved a multitude of legal issues involving Alaska Native tribes by consistently adhering to this

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[7](...continued)
correspondence); Case 58-59; S. Harring, *Crow Dog's Case* 212-14 (1995) ("Harring") (copy lodged with Clerk).

[8] Despite Judge Deady's initial unease over his own conclusion, *Seveloff*, 27 F. Cas. at 1024, he continued after the 1873 Act to insist that other Indian trading prohibitions remained inapplicable, *Waters v. Campbell*, 29 F. Cas. 411 (D. Or. 1876). Oddly, he ruled a different provision of the 1834 Act *did* apply to Alaska. *In re Carr*, 5 F. Cas. 115 (D. Or. 1875). Unlike petitioner, modern courts have criticized Judge Deady's decisions, one court terming them "superannuated." *E.g., Native Village of Venetie v. Alaska*, 944 F.2d 548, 558 (9th Cir. 1991). Commentators have also characterized Judge Deady's decisions as reflecting his own parochial, even racist, views of the proper place of Natives in American society and to the perceived negative effect of Native claims on economic development and trade. *See* Harring 214-16; Note, *"The True Interests of A White Population:" The Alaska Indian Country Decisions of Judge Matthew P. Deady*, 21 NYU J. Int'l L. & Pol. 195 (1988); Harring, *The Incorporation of Alaskan Natives under American Law; United States and Tlingit Sovereignty, 1867-1900*, 31 Ariz. L. Rev. 289, 301-02 (1989); Smith & Kancewick, 61 U. Colo. L. Rev. at 503 n.277. In one case, Judge Deady rejected aboriginal claims as "against the true interests of a white population." *United States v. Bridleman*, 7 F. 894, 896 (D. Or. 1881).

view.[9] And in 1934, Congress included the tribes inhabiting the Territory in the Indian Reorganization Act, 25 U.S.C. §§ 461-473 (IRA), *infra* 7a-14a. When the IRA's provisions proved unworkable in Alaska, *inter alia*, because the Secretary lacked the power to establish reservations out of the public domain (as well as drafting errors in the 1934 Act), Congress corrected the IRA. The amended IRA also assured Alaska tribes the right to reorganize irrespective of their residency on a formal reservation. Act of May 1, 1936, ch. 254, 49 Stat.1250, 25 U.S.C. §§ 496 (repealed 1976), 473a.

d. Congress has never terminated the Federal trust responsibility to Alaska tribes. In 1948, Congress responded to requests from Alaskan commercial fishing, mining, and other non-Indian interests by convening extensive hearings on proposals to repeal the Secretary's authority to designate reservations in Alaska, to rescind reservations which had already been created and to transfer the administration of Indian affairs to the Territory.[10] These measures were rejected, though they occasioned close congressional scrutiny of the Interior Department's Alaska reservation policy and the entire question of Alaska Native land claims and tribal governmental status.

With respect to tribal governmental authorities, Assistant Secretary Warne reviewed a long judicial and administrative course of dealings treating Alaska tribes on an equal footing with all other Native American tribes, including a Justice Department

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[9] 54 Int. Dec. 39 (1932); 53 Int. Dec. 593 (1932); 50 Pub. Lands Dec. 315 (1924); 49 Pub. Lands Dec. 592 (1923). *See also* 63 Int. Dec. 333 (1956); 60 Int. Dec. 142 (1948); *Alaska Natives Subject to Territorial School Tax* (Dep't of Int. Feb. 19, 1943) collected in 2 *Opinions of the Solicitor of the Int. Relating to Indian Affairs 1917-1974,* 1196; 58 Int. Dec. 1 (1942); 56 Int. Dec. 137 (1937).

[10] *Repeal Act authorizing Secretary of Interior to create Indian reservations in Alaska: Hearings on S.2037 and S.J. Res. 162 before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 80th Cong. 24, 32 (1948) (letter from trader Noel C. Ross opposing Venetie Reservation "land grab") (1948) ("1948 Hearings").

opinion from later-Justice Van Devanter.[11] 1948 Hearings at 40-56. He corrected the oft-repeated misstatement (resurrected by Petitioner) that there were hardly any reservations in Alaska, observing there were already over 126 reservations, new petitions were pending under the IRA, additional petitions were anticipated, and prior Administrations had been criticized for failures to provide adequate protections. 1948 Hearings at 44-47, 50; *see also* Case 83-112 (Alaska federal reservation policies); *Hynes v. Grimes Pac. Co.*, 337 U. S. 86 (1949) (commercial fishing opposition to Alaska reservations); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918) (federal authority to regulate fishing within waters of the Annette Islands Reserve). As noted later in the committee reports on ANCSA, by 1950 "over 80 villages had petitions pending with the Secretary in which they asked that reserves be established for them under the [IRA]," S. Rep. No. 92-405, 91-93 (1971)("1971 Senate Report"), not the uniform opposition to reservations asserted by petitioner. Pet. Br. 4-5.

e. Three months after these historic 1948 hearings on the equal status of Alaska tribes, Congress enacted 18 U.S.C. § 1151, *infra*, 15a-16a codifying "Indian country" to include "all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof and whether within or without the limits of a state." 18 U.S.C. § 1151 (b). At the time, Alaska was the only such "subsequently acquired territory" then outside a state where the

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[11] This long course of dealing has continued in modern times. The Secretary of the Interior has certified and published several village tribal liquor ordinances pursuant to 18 U.S.C. § 1161, *see generally United States v. Mazurie*, 419 U.S. 544 (1975), expressly confirming the "Indian country" status of the enacting villages. *See* Br. *Amicus Curiae* Tanana Chiefs Conference Inc., at 20 n.18. During the same period the Department of Justice and the Internal Revenue Service have certified Alaska Native tribes (including the local councils for Arctic Village and Venetie) as exercising "substantial governmental functions" for purposes of law enforcement initiatives and various provisions of the Internal Revenue Code. *Id.* at 30. Other Federal agencies dealing with Alaska tribes have treated them on the same basis as tribes on formal reservations. *See* Br. of *Amici* Native Village of Tanana *et al.*, 22-25 filed in *Blatchford v. Noatak*, 501 U.S. 775 (1991).

term would likely still have application.

f. The presence of Indian country in Alaska has been judicially and legislatively confirmed. On the eve of Statehood, the District Court for Alaska held that the 1948 Indian country statute encompassed Alaska reservations such as the Tyonek Reserve, rendering its inhabitants subject only to federal criminal jurisdiction. *In Re McCord,* 151 F. Supp. 132 (D. Alaska 1957). Any doubts about the existence of Indian country in Alaska that might still have remained were decisively resolved when in 1958 Congress ceded to the Territory criminal and civil adjudicatory jurisdiction over "[a]ll Indian country within [Alaska]," by amending Public Law 280. Pub. L. No. 85-615, § 1, 72 Stat. 545 (1958), 18 U.S.C.§ 1162, 28 U.S.C.§ 1360. Congress's action confirmed the existence of Indian country in Alaska. It further recognized that state jurisdiction had often been applied in Alaska and it continued that practice.

Land Claims and the Alaska Native Claims Settlement Act

3a. Prior to statehood there was little focus on Alaska Native aboriginal lands. The 1867 Treaty had neither extinguished nor granted recognized title to any of the tribes' lands and thus had preserved the status quo, *Tee-Hit-Ton,* 348 U.S. at 278, a status maintained in the Organic Act of 1884, § 8, 23 Stat. 24; the Act of March 3, 1891, § 15, 26 Stat. 1095; and the Act of June 6, 1900, § 27, 31 Stat. 321, all of which left Alaska tribes undisturbed on their aboriginal lands. *Infra.* 1a-3a. Although occasionally the President or the Secretary designated reservations (including Venetie's 1943 Reservation) to protect tribal interests, tribal aboriginal land titles remained largely unaddressed through statehood. Alaska Statehood Act of July 7, 1958, §4, 72 Stat. 339. *Infra.* 16a-17a.

After Statehood, Alaska Native land rights came into sharp focus. Under § 6, 72 Stat. 339, Alaska was entitled to choose some 103 million acres of federal lands for state ownership. When Alaska began selecting aboriginal lands used and occupied by Native tribes, protests swiftly followed. By 1961, tribes had filed protests covering 380 million acres–greater than the land area of the state, leading the Secretary to suspend virtually all

dispositions of federal lands pending congressional action. 1971 Senate Report at 95-98; R. Arnold, *Alaska Native Land Claims* 119 (1978).

b. In the course of ANCSA's development, the Alaska Native leadership made its objectives unmistakably clear: (1) Natives had to retain title to between 40 and 60 million acres of their aboriginal lands, anchored in lands surrounding each Native village; (2) title to the unceded retained lands had to be full fee title, not "trust" title under the control of the BIA; (3) Congress had to leave the unceded lands and settlement funds in Native hands; (4) Congress had to continue protecting Alaska Natives by exempting the undeveloped lands from state taxes; (5) tribes with pre-existing reservations had to retain the option of keeping those reservation lands; and (6) Congress had to maintain the Federal Government's trust services to the tribes and their members. Alaska Natives never expressed an intent or desire to reduce their governmental rights over the land they would retain, but only to increase their control by avoiding BIA oversight. *See generally* Arnold 120-136.

ANCSA met all these requirements. ANCSA reserved to Alaska Natives full title to over 44 million acres (including former reservations), it extinguished aboriginal title to all other ceded lands, it placed those lands in the public domain, and it paid the Natives $962.5 million. 43 U.S.C. §§ 1603(b), 1605(a), 1611, 1613(h), 1615(b), (d), 1618(b).

With respect to the acreage, the surface estate in 22 million acres was reserved and distributed to all but the southeast Native villages using a population formula; another 16 million acres were reserved (along with the subsurface to the first 22 million) for the twelve regional Native investment entities established for the major ethnic tribal groupings; 2 million acres were reserved for various special purposes; and limited additional lands were reserved for the southeast villages. *Id.* §§ 1611(a), (b), (c), 1613(h), 1615(b).

All available lands in the "core" townships were automatically secured to the villages, and additional lands in the surrounding 24 townships were available to make their full entitlement, so that today most lands in and surrounding Native villages remain

in Native ownership. *Id.* §§ 1610(a), 1611(a)(1), 1611(c)(1), 1641(b). (ANCSA anchored the land in the villages, the very opposite of a "haphazard" or "buckshot" approach, Pet. Br. 45, 48.) Although all lands were patented in full fee title, all undeveloped lands were protected by federal law from "state and local real property taxes," "local assessments," and "municipal taxes." 43 U.S.C. §§ 1613(a), 1620(d).

ANCSA placed all settlement assets under the exclusive control of unique Native corporations. Each village, itself a tribe, also established a corporation under state law to "hold" the land and act "for and on behalf of" the village, though Congress also protected Alaska Native interests from various aspects of State corporate law. *Id.* §§1602(j), 1607(a). Only Natives from a village received stock in the corporation, stock was made inalienable, and only Natives retained shareholder voting rights in the event of stock transfers due to inheritance or divorce. Pub. L. 92-203, §§ 7(h), 8(c) (1971).[12] Under the original enactment, Native control of the village and regional corporations was guaranteed for at least 20 years. *Id.* Contrary to petitioner's suggestion, Pet. Br. 31, 34, Congress hardly conceived of these *sui generis* Native corporate entities as ordinary "private business corporations."

c. ANCSA preserved for reservation tribes such as respondent the option to receive either (1) full title to their reservation lands but no settlement benefits–no funds, land selection rights or regional shareholder rights, and no settlement obligations (such as re-conveyances to municipalities and others)–or (2) surface title to ANCSA formula lands plus settlement funds, regional shareholder benefits, and reconveyance obligations. 43 U.S.C. § 1618(b).

Finally, ANCSA left in place the Federal Government's trust responsibility by preserving Alaska Natives' eligibility to receive all the Federal Government's Indian trust services, *id.* § 1601(c), a provision which, as amplified by § 1626, guarantees for Alaska

[12] The twelve regional Native corporations were similarly established as Native-only institutions, but with their shareholders comprised of all the village shareholders plus all "at-large" Native people of a region not enrolled with any particular village. *Id.* § 7.

tribes precisely the same trust services that the BIA, IHS and other federal agencies provide to "Lower 48" tribes in Indian country. These services include tribal government assistance, financial and employment assistance, educational support, family support, housing assistance, road maintenance and construction, and comprehensive health care. Tribal trust services in Alaska today total just under $500 million annually, and they are primarily administered by the tribes themselves under Titles I, III and IV of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-450hh. *See* Br. for *Amici* Tanana at 10-14.[13]

d. ANCSA indeed marked a "dramatic break with prior federal Indian legislation," Pet. Br. 9, not in its extinguishment, compensation and reservation of lands for tribes, but in its rejection of the anti-Indian terminationist legislation of the 1950s. *Compare e.g., Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968). Beginning in the 1960s, both Congress and successive Presidents moved Native American policy into the "Self-Determination" era, a policy most clearly articulated by President Nixon's 1970 Special Message to Congress on Indian Affairs, Pub. Papers 564-76 ("Nixon Policy"). Cohen 180-205. The President's policy, issued in the midst of ANCSA's development and embraced by the same committees of Congress considering

[13] The State strains to characterize Alaska Native communities essentially as well-off, "not dependent on the federal or territorial government for their existence" (unlike, it is implied, other Native American communities). Pet. Br. 5. Though legally irrelevant, this all too sadly is not true. When ANCSA was considered Alaska Natives lived in "dire poverty." 1971 Senate Report at 99. The median age of death was 34.5, and Native infant mortality for some age classifications was *12 times* the rate for the general population. *Id.* at 103. The median village cash income for working Natives was $1,204 (a quarter of the white rate), Native unemployment stood at 60 percent, and only 8 percent of Natives completed high school. *Id.* at 72, 101-02; *see also id.* at 71-72 (summarizing the "appalling" conditions in the villages). Unfortunately, today Native villages remain plagued by poor health, unemployment, welfare dependence, suicide, poor education, disproportionate incarceration, and substandard or nonexistent housing and basic water and sewer service. Alaska Natives Commission *Final Report* (1994) (a congressional study authorized by Pub. L. No. 101-379, § 12, 104 Stat. 478 (1990), 25 U.S.C. § 2991a note). Estimated 1968 federal "Indian program" expenditures "chiefly" for Alaska Native villages were $43 million, *Alaska Natives and the Land* 31-33, and today exceed 10 times that sum.

ANCSA,[14] called upon the Federal Government "to explicitly affirm the integrity and right to continued existence of all Indian tribes and Alaska Native governments." Nixon Policy 567. It denounced the BIA's oppressive controls over tribal life, while also discrediting the policy of terminating the federal-tribal relationship–which was to eliminate special federal "Indian" services, abolish group tribal land holdings, eliminate all state and federal tax exemptions, dismantle the tribes, and completely assimilate Native Americans into their surrounding states. *Id.* at 565-67. The new congressional Self-Determination policy has consistently been to renounce federal paternalism, protect Native control over Native resources, promote Native economic development, strengthen tribal institutions, and expand federal Indian programs and the opportunity for tribes to operate and redesign those programs, all while preserving the federal-tribal trust relationship.[15]

ANCSA is firmly rooted in this tradition. In condemning the BIA's excessive paternalism, Congress rejected Interior Department proposals to place all settlement lands in trust. *Infra* at 43, n.42. Instead, ANCSA lands enjoy various federal protections but are also free of daily BIA control. Congress also renounced termination. It rejected proposals to abolish all Native rights and interests, and to place all tribal lands in the hands of state-chartered non-Native local municipal governments, instead establishing exclusively Native village corporations. *Infra* at 48, n.49. Likewise, Congress rejected proposals to abolish most

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[14] *See, e.g.*, S. Con. Res. 26, 92nd Cong. (1971) as favorably reported by the Interior Committee as it considered ANCSA, *see* S. Rep. No. 92-561 (1971) (disavowing the termination policy and declaring "our national Indian policy" to be, *inter alia*, maximizing opportunities for Indian and Alaska Native control and self-determination); *see also* S. Con. Res. 34, 91st Cong. (1969) (supporting continued "self-determination" of "Alaska Native governing bodies").

[15] Cohen 188-204 (discussing various Self-Determination Era statutes such as the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341; the Indian Financing Act of 1974, 25 U.S.C. § 1451; the Indian Self-Determination Act of 1975, *supra*; and the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963).

federal Indian trust programs,[16] and it insisted on special measures protecting Native lands from state taxation and assuring Native control through Native-only voting rights and stock inalienability measures. As Senator Stevens aptly noted, "[W]e have basic agreement on the fact that the Alaskan Native people themselves should have the right to self-determination. This is consistent with the President's policy of self-determination without termination." 117 Cong. Rec. 38,440 (1971).[17]

Amendments to Alaska Native Claims Settlement Act

4. Since 1971 Congress has maintained an extraordinarily active role in protecting the interests of Alaska Natives under ANCSA. *Infra* 109a-110a. Through 29 amendments Congress effectively extended in perpetuity the inalienability of Native corporate stock and the restriction against non-Natives holding corporate voting rights, largely doing so by pre-empting state law and prescribing detailed and difficult supermajority voting procedures before stock inalienability restrictions can ever be lifted. 43 U.S.C. §§ 1606(h)(1), (h)(2), 1629(b), 1629(c). It created, then later enlarged

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[16] *Compare* S. 1830, §4(b), as reported, S. Rep. No. 91-925 (1970)("1970 Senate Report"), *with* 43 U.S.C. § 1601(c). The principal Senate bill in the 91st Congress proposed terminating the federal-tribal trust relationship within five years, transferring full responsibility for Alaska Natives to the State. 1970 Senate Report at 112, 114-15 (discussing §§ 2(d) and 4(b), S. 1830). After sharp debate in the Senate, in the next Congress the identical bill (S. 35) was amended to delete § 4(b)'s termination language, leaving in place § 1601(c)'s provision for a study of federal Indian programs. 1971 Senate Report at 2, 109; *see also* 117 Cong. Rec. 38,445 (1971) (comments of Senator Harris) (explaining agreement in final measure to continue all trust services).

[17] *See also* 117 Cong. Rec. 46,789 (1971) (Alaska Rep. Begich) ("The distribution of money and the system of administration established by the legislation focuses on self-determination, *village autonomy*, and an orderly flow of revenues over a period of years which will permit the social, economic and cultural choices of Alaska's Natives to be made as independently, as deliberately, and as responsibly as possible.") (emphasis added); 117 Cong. Rec. 38,446 (1971) (Sen. Metcalf) ("[T]here is a special affinity, a spiritual affinity, of Alaska and other Indian Natives, to the land on which they were born and on which their tribal organizations exist. We have recognized that spiritual affinity by giving them an opportunity to accept this land in and around their tribal communities.")

and extended forever, detailed automatic protections for undeveloped lands from both taxation and virtually any involuntary loss. *Id.* § 1636(d). It exempted Native corporations from federal securities and investment laws, while also preempting state corporate law in a wide range of other matters including internal corporate affairs, corporate mergers, dissenters' rights, amendments to articles of incorporation, shareholder petitions, valuation of corporate assets, voting requirements, and formation of trusts.[18] *Id.* §§ 1625, 1627, 1629b, 1629c, 1629d, 1629e.

The foregoing historic and statutory review reflects the Federal Government's ongoing protection of Alaska Native villages and their lands, extending from the Alaska Purchase to the present. Today the Federal Government exercises a pervasive superintendence over the affairs of Alaska Native tribes, a course of treatment that has been deliberately honed both to maximize village autonomy and self-determination, and to renounce Federal paternalism–while actively preserving the Government's role

[18] Congress also dealt with the Alaska Native Fund in the same way as tribal trust funds. 43 U.S.C. § 1605 note. It escrowed land revenues at interest pending conveyance of the lands. *Id.* § 1613 note . It extended to Native corporations the "Indian tribe" exemption from the 1964 Civil Rights Act (42 U.S.C. § 2000e), and it exempted ANCSA benefits (just like tribal judgment funds, 25 U.S.C. § 1407) from being considered in the computation of federal or federally-assisted poverty programs. 43 U.S.C. § 1626. It also added preferential tax treatment for Native corporation land by increasing its tax basis, it treated inalienable ANCSA stock identically to individual trust allotments for purposes of estate taxation, and it authorized village corporations to institute shareholder homesite programs under the protection of special tax exemptions. *Id.* § 1620(c), (f), (j).

Through many of these measures, Congress has continually provided Alaska Native villages with the tools to mold their corporations into culturally appropriate institutions far removed from ordinary business corporations. In so doing, Congress has also sought to remedy the difficulties created by the artificial 1971 cut-off in the original shareholder enrollment and the general corporate rule requiring equal benefits per share. Today, shareholders can donate their stock to relatives who own none, corporations can issue extra stock to elders to enhance their benefits consistent with tribal traditions, and corporations can issue new stock to Natives born after the 1971 cutoff without waiting to inherit corporate stock–all while immunizing the Native corporations from ordinary state laws regarding stock dilution and dissenters' rights. *Id.* § 1606(h)(1)(C)(iii), (g)(1)(B).

as trustee. At the same time, the Venetie Tribe has continuously governed the affairs of all people and lands within its former Reservation. These facts set the framework for the issues on appeal.

SUMMARY OF ARGUMENT

"The three branches of government, as well as general principles of taxation, confirm that Indian tribes enjoy authority to finance their governmental services through taxation of non-Indians who benefit from those services. Indeed, the conception of Indian sovereignty that this Court has consistently reaffirmed permits of no other conclusion." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982). Particularly where a tax is assessed on activities occurring on tribally-owned lands, and is in place before entry is permitted on those lands, a tribe's tax can be sustained based solely on its power to exclude. *Merrion*, 455 U.S. at 144. On this basis alone, the judgment below can be affirmed.

The facts as found by both courts below also confirm Venetie's territorial authority over its lands as a "dependent Indian communit[y]" under 18 U.S.C. § 1151(b). Consistent with *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991); *United States v. Sandoval*, 231 U.S. 28, 46 (1913); *United States v. McGowan*, 302 U.S. 535, 538 (1938), the discrete area occupied by the Venetie Tribe is of a unique Indian character, and the Federal Government has continuously protected and set apart these lands for the Venetie Tribe. Further, as a federally recognized Tribe, the Tribe enjoys the Federal Government's superintendence and protection. That Venetie's homelands now are owned in fee common by the Tribe, rather than by the Federal Government in trust, has no bearing on the land's "Indian country" status, which turns primarily on the Federal Government's unique treatment of the Tribe and the area.

Before any statute is construed to reduce or eliminate the territorial jurisdiction of a tribe, "Congress [must] clearly evince [such an] intent." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)(quotations omitted). ANCSA does not meet this rigorous

standard, and thus cannot terminate what both courts below found to be Venetie's dependent Indian community status. Not only are the Act and its legislative history conclusively silent on this issue, but Venetie's continued territorial jurisdiction is readily harmonized with ANCSA's key provisions. ANCSA plainly directed that the former reservation lands be set apart for Venetie. 43 U.S.C. § 1618(b). The technical revocation of the Tribe's reservation under § 1618(a) was accomplished strictly to renounce BIA control over the land, increase the tribe's control over the land, and secure to the Tribe full fee title–a perfect expression of maximizing tribal self-determination by "maximi[zing] participation by Natives in decisions affecting their rights in property." *Id.* § 1601(b). The establishment of unique corporations to hold the land strictly "for and on behalf of" the Tribe, § 1602(j), reflects a calculated effort to increase tribal economic development options while permitting the fruits of any success–shareholder dividends–to be enjoyed by the tribal member-shareholders wherever they might reside. Both measures reflect an express intent to achieve "self-determination without termination."

For these reasons, the judgment below should be affirmed. As for the implications for the State, Indian country is not the impenetrable shield to state jurisdiction petitioner suggests. The Federal Government has complete authority to subject Indians in Indian country to state jurisdiction–and it has done so in Alaska in the areas of criminal and civil adjudicatory jurisdiction, *see* Public Law 280; taxation of ANCSA lands, 43 U.S.C. § 1620(d); application of corporate law, *id.* § 1602(j); and regulation of fish and game on ANCSA lands, 16 U.S.C. §§ 3111-126. Further, a state can generally regulate the affairs of non-Indians in Indian country, *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980), and under certain circumstances may tax Indians too. *Colville*, 447 U.S. at 164. The Indian country status of Venetie's lands is hardly the absolute barrier espoused by petitioner as a reason to depart from this Court's strict rules controlling the disestablishment of a tribe's territorial integrity.

ARGUMENT

I. THE TRIBE'S POWER TO EXCLUDE OTHERS FROM TRIBALLY OWNED LANDS IS SUFFICIENT TO SUSTAIN ITS AUTHORITY TO TAX.

In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), this Court acknowledged two sources of a tribe's sovereign authority to tax: the power is both "a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law," *Merrion*, 455 U.S. 137, and is part of "the Indian tribe's power to exclude non-Indians from tribal lands." *Id.* On the latter point the Court noted "that a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands, and that this power provides a basis for tribal authority to tax." *Id.* at 141. The dissent agreed. *Id.* at 173.

The tribal tax at issue here was assessed against a private contractor engaged in a school construction project on tribal lands which had been licensed and leased to the local school district and the State. *See supra* at 5-6. Just as surely as the construction project benefitted the Tribe by improving the quality of education facilities, it also burdened the Tribe with the obligation to provide necessary governmental services, including maintenance and operation of the tribal airport and local roads, law enforcement, the health clinic, and garbage and utility services. The tribal tax imposed here was designed "to raise revenues for [the Tribe's] essential services," *Merrion*, 455 U.S. at 137, and otherwise "pay for the costs of self-government." *Id.* at 144. Unlike the circumstances in *Merrion*, here the school district, the State and the private contractor all were well aware of the Tribe's assertion of taxing authority prior to the time the school-land leases and the school-construction contract were consummated. *E.g.*, Ex. 124, 132, 134, and 136, Dkt.Nr. 109.

The facts here are not in any other respect materially distinguishable from those considered in *Merrion* and *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985), with the single exception that here the tribal lands are held by the Tribe in

communal fee, while there the lands were held in trust by the Government for the benefit of the tribes. Insofar as the sovereign power to tax on sovereign owned land is concerned, it is impossible to discern any legal significance in that difference. The cases hold that a tribe may tax business activities which it permits to take place on tribal lands, particularly where the tax is in place prior to entry on the land. On this basis alone (and under the *Merrion* dissenters' view as well, 455 U.S. at 185-86 (Stevens, J., dissenting)), the judgment below can and should be affirmed.

While it is thus unnecessary to review what petitioner perceives to be the broader ramifications of the court of appeals' opinion as it pertains to other Alaska tribes not before the Court, we show that affirmance also results from a review of those issues.

II. THE FORMER VENETIE RESERVATION IS A DISCRETE AREA INHABITED BY A DISTINCTLY INDIAN COMMUNITY UNDER THE FEDERAL GOVERNMENT'S SUPERINTENDENCE AND PROTECTION, AND THEREFORE IS A "DEPENDENT INDIAN COMMUNITY" UNDER 18 U.S.C. § 1151(b).

Congress has defined three separate categories of Indian country: reservations, allotments and "dependent Indian communities." 18 U.S.C. § 1151. At issue here is the final category, encompassing "all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof and whether within or without the limits of a state." § 1151(b). Alaska is within the "subsequently acquired territory" of the United States, and the tribal lands at issue here fall comfortably within the plain meaning of this provision.

As found by the district court, confirmed by the court of appeals, and unchallenged by petitioner, Venetie is a "distinctly Indian community." Pet. App. 121a. Virtually all of the permanent residents are Indian, and all are members of the Venetie Tribe. As found below Venetie's lands, too, are of a uniquely Indian character. Not only are the lands uniquely suited to supporting

the Tribe's subsistence way of life since time immemorial, *id.* at 62a, but Congress in ANCSA confirmed the set aside of Venetie's lands for that very reason.

As a federally recognized tribe, Venetie is entitled to and in fact enjoys the Federal Government's "protection, services and benefits," and possesses "the immunities and privileges available to other federally recognized Indian tribes." 58 Fed. Reg. 54,364. Due to this political status, the Tribe is the beneficiary of the Federal Government's trust responsibility. Since the Tribe is under the "superintendence" of the Federal Government, which clearly and purposefully "set aside" its lands for the exclusive benefit of the Tribe, *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991), its lands qualify as a "dependent Indian community."

A. Venetie is a Federally Recognized Tribe and Therefore is Under the Active Political Superintendence of the Federal Government.

1. 18 U.S.C. § 1151(b) requires the presence of a "distinctly Indian community" under the federal government's political "superintendence."

a. In codifying the "dependent Indian communities" provision of § 1151(b), Congress restated almost verbatim the holding of *United States v. Sandoval*, 231 U.S. 28, 46 (1913), as repeated in *United States v. McGowan*, 302 U.S. 535, 538 (1938) . *See* 18 U.S.C. § 1151 note (Reviser's Note, 1948 Act). *Sandoval* and *McGowan* "held that Indian country includes those tribal Indian communities under federal protection that did not *originate* in either a federal or tribal act of 'reserving,' or were not specifically designated as a reservation." Cohen at 38 (emphasis added).

As its roots reflect, the key to § 1151(b) Indian country is political dependency, not federal land title. The phrase "dependent Indian communities"dates from Chief Justice Marshall's seminal observations of "Indian nations as distinct political communities" in a "dependent" relationship with the Federal Government by

virtue of their "subordination" to the superior power of the United States, akin to a guardian-ward relationship. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16-20 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).[19] *Sandoval* continued that understanding–that congressional power in Indian affairs is rooted in the *political* dependency of tribal Indians on the United States. New Mexico argued that since Pueblo lands were not held in trust by the Federal Government they were not subject to federal guardianship. 231 U.S. at 48. Rejecting this argument, Justice Van Devanter applied the "dependent Indian community" term to the Santa Clara Pueblo, and sustained the constitutionality of a statute which (like the 1873 Act for Alaska, *supra* at 9) designated Pueblo tribal fee lands as "Indian country" for purposes of prohibiting alcohol.

b. Like New Mexico in *Sandoval* and Oklahoma in later cases, Alaska seeks to limit the scope of "dependent Indian communities" to preclude tribal lands owned in communal fee. But in *Sandoval* the Court rejected this very assertion. It looked beyond technical fee title, 231 U.S. at 48, and focused on the foundational legal principle of "dependency" to confirm congressional power over all Indian communities of a "tribal" nature:

> Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but . . . the United States as a superior and civilized nation [has] the power and the duty of exercising a fostering care and protection over all

[19]*See also United States v. Kagama*, 118 U.S. 375, 384 (1886)(employing the phrase to describe the guardian relation that is the foundation for Congress' plenary power in Indian affairs). Chief Justice Marshall equated tribal dependency not with poverty (as would Petitioner) but with the subordinated political status of Tribes: "[T]he settled doctrine of the law of nations is that a weaker power does not surrender its independence–its right to self-government–by associating with a stronger and taking its protection. A weak State, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a State." *Worcester*, 31 U.S. at 560. With political dependency the common thread in all the "Indian country" categories, the Court readily found that allotments within disestablished reservations remain Indian country so long as the Government's guardianship continues. *United States v. Pelican*, 232 U.S. 442, 447 (1914).

> dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired.

Id. at 45-46. The Court concluded that this power had been properly asserted in treating the Pueblo as a "distinctly Indian community" having a status of dependency "requiring the guardianship and protection of the United States...." *Id.* Congress's power to enact protective legislation on behalf of the Indians–a power grounded in the dependency relationship–was legally sufficient to make the nature of land tenure irrelevant.[20] *Id.* This dependency and the federal power stemming from it operate independently of the particular property rights held by the Indians or the United States, for neither the guardian-ward relationship nor that power turn on a particular form of land title in the United States either in "reversion or to the holding of a technical title in trust." *Heckman v. United States*, 224 U.S. 413, 437 (1912); *accord United States v. Rickert*, 188 U.S. 432 (1903). Consistent with *Sandoval*, § 1151(b) Indian country turns on occupancy by a "distinctly Indian communit[y]" recognized by the Federal Government as "dependent" and thus "entitled to its aid and protection,"[21] 231 U.S. at 46-47, a status consistent with tribal

[20]Justice Van Devanter added:

> In other words the lands are public lands of the pueblo, and so the situation is essentially the same as it was with the Five Civilized Tribes, whose lands, although owned in fee under patents from the United States, were adjudged subject to the legislation of Congress enacted in the exercise of the government's guardianship over those tribes and their affairs.

Id. at 48; *see also United States v. Chavez*, 290 U.S. 357, 364 (1933) (Indian country includes "any unceded lands owned or occupied by an Indian nation or tribe of Indians"). In championing *Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d. 908, 918 (1st Cir. 1996), *amici* concede that "federal title is not a prerequisite." *Amici Curiae* Br. California *et al.*, at 17.

[21]In upholding Congress' plenary power to regulate the affairs of the Pueblo Indians, the Court departed from its contrary ruling in *United States v. Joseph*, 94 U.S. 614 (1877). In so doing it confirmed that the outward manifestations of federal superintendence over the Pueblos (such as the expenditure of public monies to guard their interests, providing goods and services, prohibiting importation of alcohol into their lands and exempting their lands from state taxation), *Sandoval*, 231 U.S. at 49, were sufficient to reflect their politically dependent status irrespective of their level of citizenship, type of land tenure,

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fee title.

c. *McGowan*, the other source of § 1151(b), articulates the same standard for Indian country. In finding the federal Indian country liquor prohibition applicable to the Reno Indian Colony, the Court relied on *Sandoval* to conclude that the prohibition was a protection extended by the United States "over all dependent Indian communities within its borders..." irrespective of land tenure. 302 U.S. at 538. The Court added: "The fundamental consideration of both Congress and the Department of the Interior in establishing this colony has been the protection of a dependent people." *Id.* The lack of any distinction between the federal treatment afforded the Reno Colony and that afforded reservation tribes, and the government's "superintendence" over the Colony, made it "immaterial whether Congress designates a settlement as a 'reservation' or 'colony.'" *Id.* at 538-39. Congress's express reliance on *Sandoval* and *McGowan* for § 1151(b), confirms that a "dependent Indian community" connotes a political relationship.[22]

(...continued)
or degree of assimilation.

[22]The Circuit Courts' dependent Indian community cases are in harmony with the principles of *Sandoval*, *McGowan* and *Potawatomi*, as reflected in § 1151(b). Within their "multi-factored inquiry" the Courts of Appeals continue to acknowledge that the "two central features of the inquiry into whether a given area constitutes Indian country" are "first, whether the territory is 'validly set apart for the use of the Indians as such,' and second, whether the Natives who inhabit it are 'under the superintendence of the [federal] government.'" Pet. App. 6a-7a (and cases cited therein); *see also* Pet. App. 11a. The multi-factored analyses employed in these cases "provide meaning to the general notions of set aside and superintendence," Pet. App. 12a, two broad concepts whose application in various settings necessarily is facilitated by the guidance these cases provide. The First, Eighth, Ninth and Tenth Circuits employ a virtually identical approach for determining the presence of a "dependent Indian community," Pet. App. 12a-13a, as reflected both in the decision below and in *Narragansett Indian Tribe v. Narragansett Elec. Co.* 89 F.3d 908, 917-22 (1st Cir. 1996);*Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1545 (10th Cir. 1995); *United States v. South Dakota*, 665 F.2d 837, 839 (8th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982), an approach that is the only practical means of maintaining flexibility in addressing the diversity of Indian communities occupying Indian country from state to state. *See also Blatchford v. Sullivan*, 904 F.2d 542, 548 (10th Cir. 1990), *cert. denied*, 498

(continued...)

2. The Venetie Tribe is under the superintendence of the Federal Government.

a. The Venetie Tribe is federally recognized and thus is plainly under the protection of the United States.[23] *United States v. John*, 437 U.S. 634, 650 (1978). The Federal Government has a long and unbroken course of dealings with the Tribe, consistently protecting Venetie's aboriginal lands beginning with the 1867 Treaty of Cession. *Supra* at 8. The Department of the Interior has continued to deal with Venetie as a tribal political body entitled to the Federal Government's guardianship and protection, as when the Department conducted a 1939 election among Venetie's members to accept the protections and benefits of the IRA. *Supra* at 3. Later in 1943, to "protect this well-established" and "self-maintaining" Tribe from the "intrusion of white trappers" and the introduction of "intoxicating liquors," a reservation was "set aside for the protection and benefit of the native Indians of Venetie." J.A. 108-109, 135. Since then, the Federal Government has continually exercised its trust responsibility over Venetie

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[22](...continued)
U.S. 1035 (1991); *South Dakota*, 665 F.2d at 839; *United States v. Cook*, 922 F.2d 1026, 1031 (2d Cir.), *cert. denied*, 500 U.S. 941 (1991); *United States v. Levesque*, 681 F.2d 75, 77 (1st Cir.), *cert. denied*, 459 U.S. 1089 (1982).

The essentially identical approaches, including the absence of any particular land tenure requirement, have been disturbed by the First Circuit's very recent shift in one respect, now requiring that federal superintendence be "dominant" vis-a-vis state involvement. *Narragansett*, 89 F.3d at 908. This change, at odds with the Court's rejection of this very argument in *Potawatomi*, was based solely on the erroneous opinion of the District Court here. It is also inconsistent with the First Circuit's earlier ruling in *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir.), *cert denied*, 513 U.S. 919 (1994), and effectively permits what would otherwise be a regime of concurrent state-tribal jurisdiction to trump tribal jurisdiction altogether.

[23] Petitioner incorrectly asserts that the requisite federal superintendence must be over lands. Pet. Br. 39. In *John*, 437 U.S. at 649, this Court expressly stated that it is "Indians" that must be "under federal supervision." (Nonetheless, Congress has in fact enacted substantial protective measures over ANCSA land.)

through the provision of essential governmental services and programs, J.A. 55-56; 90-92,[24] and through Venetie's inclusion with all other Native American tribes in a host of federal Indian statutes likewise designed to promote the welfare of tribal Indians. *Infra* 121a-127a. It has made abundantly clear that Venetie is "acknowledged to have 'the immunities and privileges available to other federally recognized Indian tribes,'" and that it is a "distinctly Native community[]" with "the same status as tribes in the contiguous 48 states" entitled "to the protection, services and benefits from the Federal Government available to Indian tribes." 58 Fed. Reg. 54,364.

b. ANCSA, too, preserved the Federal Government's superintendence role over Venetie. All the original protective measures concerning stock inalienability, voting rights, and land protection, along with ANCSA amendments extending to the lands the same benefits as other Indian country lands (and to Venetie the same protections and benefits as other tribes) speak powerfully to that role. So, too, do ANCSA's provisions preserving the Federal Government's trust responsibility to provide desperately needed health, social, welfare, and economic programs for the Tribes; continuing special federal grant programs; imposing extensive controls over the activities of the corporations prior to their dissolution; and extending broad tax protections for the land. 43 U.S.C. §§ 1601(c), (g), 1606, 1607, 1611(b), 1620.

[24]Venetie's allocation of federal Indian Health Service monies for the 1992 year alone totaled $445,000. J.A. 55-56. In addition to Self-Determination Act programs, the Tribal Government has administered federal grant projects for both villages including $3,000,000 for airport construction, Ex. 127, Dkt.Nr. 109; $1,740,000 to build a twenty-nine unit Indian housing project, Ex. 118, Dkt.Nr. 116, p. 133; funds to construct comprehensive water and waste disposal system, Ex. 155 & 156, Dkt.Nr. 109; $850,000 for a U.S. Housing and Urban Development Indian housing renovation project; and $158,000 from the Administration for Native Americans for a self-governance project to codify tribal law, Ex. 163 at 12, Dkt.Nr. 114, p. 102. Although Alaska implies these are merely programs for poor people "not tied to their Indian status,"(Pet. Br. 42), these tribal trust services in fact draw their constitutional authority from Congress's power under art. III, sec. 8, cl. 3 of the Constitution "to regulate Commerce . . . with the Indian Tribes," and thus to legislate with respect to such political entities and their members. *Morton v. Mancari*, 417 U.S. 535 (1974).

ANCSA and its many amendments underscore the Federal Government's continuing superintendence over Venetie. *Supra* at 17-18; *infra* at 109a-110a. Congress's behavior thus reflects a continuing course of conduct that has furthered its objective of protecting Venetie and its ANCSA lands for maximum Native benefit.[25]

[25]No deference should be accorded the contrary general conclusions of law set forth in Interior Solicitor Sansonetti's unpublished opinion, *Legal Status of Alaska Natives*, M-36975 (Dep't. of Interior, Jan. 11, 1993). First, since it has never been published the opinion is not even binding on the Department. *See Southern Ute v. Amoco Prod. Co.*, 119 F.3d 816, 831-33 (10th Cir. 1997)(quoting internal DOI regulation). Second, the opinion enjoyed but a one week life under the outgoing Administration before being placed under "review" by the new Administration, 58 Fed. Reg. 54,366 n.1, where it has remained ever since. 60 Fed. Reg. 9,250, 9,251 n.1 (Feb. 16, 1995). Third, as with any such opinion, it is not entitled to deference under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), since it was not the product of either legislative rulemaking or administrative adjudication. *Southern Ute*, 119 F.3d at 832-33 (denying deference to a published Solicitor's opinion). Such "opinions" simply are not the kind of "binding policy pronouncement[s]" to which deference is owed. *Metropolitan Stevedore Co. v. Rambo*, 117 S. Ct. 1953, 1963 n.9 (1997); *see also, e.g., Smiley v.* Citibank, 116 S. Ct. 1730, 1733 (1996); *Martin v. OSHRC*, 499 U.S. 144, 156-57 (1991).

Further, Congress has not delegated any authority to the Department to determine the continued existence of Indian country in Alaska. Indeed (and as the opinion notes, pp. 4-5), Congress has expressly determined that this issue is to be left to the judiciary. The opinion thus does not even satisfy the threshold "precondition to deference under *Chevron*." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). Certainly no such delegation can be found in 43 U.S.C. § 1624, which only authorizes "regulations" to "carry out the purposes of" ANCSA, and the opinion expressly notes (pp. 1-2) it has nothing to do with "implementing ANCSA," Pet. Br. 10. Nor is there a delegation in 25 U.S.C. § 2, Pet. Br. 10, which plainly is "not a general power to make rules governing Indian conduct." *Organized Village of Kake v. Egan*, 369 U.S. 60, 63 (1962). In short, "lacking power to control," both the opinion's general conclusion about Indian country in Alaska and its cursory analysis of Venetie's status (pp. 122-23), bear only the weight supported by "all those factors which give it power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see, e.g., Metropolitan*, 117 S. Ct. at 1962.

c. There is no basis for limiting "dependent" Indian communities to groups that are in fact "simple, uninformed and inferior," Pet. Br. 23, n.14. Such standards have never been the test for "dependency." Rather, the courts have uniformly relied on the determinations of the political branches to treat a particular Indian group as subject to federal authority because of its tribal status, *e.g., United States v. John*, 437 U.S. at 652-53, as in fact the Court did in *Sandoval*, 231 U.S. at 40, 46-47.

d. The Federal Government has never abandoned its trust responsibilities to the Venetie Tribe. Alaska nonetheless seeks to minimize this omnipresent superintendence, asserting that the "extension of such benefits does not amount to federal superintendence or establish the Natives' dependency," implying something more is necessary. Pet. Br. 42. Indeed, Alaska would have this Court totally rewrite the fundamental concept of political dependency into one of welfare dependency. No case law or statute supports such a sweeping revision–one that would require Venetie and other "dependent" tribes to exist in abject poverty, utterly reliant on the BIA for their every need–and understandably this Court has never searched for such facts in considering the nature of Indian country under § 1151.[26]

Indeed, such a formulation disregards three decades of unbroken federal Indian policy expressly designed to reduce the dependence of *all* tribes–in the sense of welfare dependency–on the Federal Government and to free tribes from the yoke of oppressive BIA

[26]This Court has expressly rejected the argument that a tribe's receipt of state services diminishes its political dependency on the Federal Government. *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 476 (1976); *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 173 n.12 (1973). Similarly, this Court in *John*, *Potawatomi* and *Sac & Fox* disregarded the argument in the States' briefs, repeated here, that federal superintendence must be "pervasive" in Indian country. Pet. Br. 42. Indeed, applying such a standard would virtually annihilate Indian country in all Public Law 280 states (and other states such as Oklahoma and New York operating under similar statutory regimes) where the states exercise substantial jurisdiction in Indian country. Tribal member participation in state programs or state politics is no more a substitute for tribal sovereignty than is State representation in Congress a substitute for state sovereignty. *Garcia v. San Antonio Metro*, 469 U.S. 528, 565-65 (Powell, J., dissenting).

oversight, all while strictly maintaining the political "dependent" relationship. *Supra* at 15-16. The flagship legislation of this era, the Indian Self-Determination Act, was enacted to eliminate "Federal domination of programs for, and services to, Indians," while maintaining the "Government's unique and continuing relationship with, and responsibility to, the individual Indian tribes." 25 U.S.C. § 450a(b). Today, that Act requires the Federal Government to transfer its Indian programs to tribal administration, hardly a policy of maintaining the sort of economic dependency and paternalism Alaska advances as the necessary *sine qua non* of Indian country status. That statute and substantial portions of Title 25 (*infra* 113a-115a, 124a) enacted through this period "reflect Congress' desire to promote the 'goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development.'" *Potawatomi*, 498 U.S. at 510 (citation omitted). Thus both modern laws and this Court's jurisprudence recognize that Indian tribes maintain their tribal political relationship with the United States regardless of economic status.

B. Venetie's Lands Have Continuously Been Set Aside For the Venetie Indians.

1. Congress has recognized the Venetie reservation area as a distinct location for the Venetie Tribe.

a. As the leading treatise concludes, since "the terms of section 1151(b) refer to residential Indian communities under federal protection, not to types of land ownership or reservation boundaries," whether a particular area fits within § 1151(b) depends on "the federal purpose in recognizing or establishing a reasonably distinct location for the residence of tribal Indians under federal protection." Cohen at 39.[27] Where a federally

[27]Alaska errs in suggesting that § 1151(b) is limited to instances where Congress has intended to "create" Indian country, by declaring an area to be a "reservation or its equivalent." Pet. Br. 20-27, 34. Neither *Sandoval* or any other case

(continued...)

recognized tribe comprises a "distinctly Indian community" occupying a discrete area, and is subject to legislation enacted in furtherance of the Government's guardianship over that community, the community land base has consistently been regarded as set apart for the use of Indians.[28] *Sandoval*, 231 U.S.

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[27](...continued)
decided either before or after the 1948 enactment supports such a construction of the term, particularly one which, as *Amici* Council of State Governments correctly note, historically "has been left by Congress largely in this Court's hands." *Amici* Br. 3. Indeed, this argument has long been rejected, even as to reservations:

> Now, in order to create a reservation it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes.

Minnesota v. Hitchcock, 185 U.S. 373, 389-90 (1902); *see also Spalding v. Chandler*, 160 U.S. 394, 403-04 (1896); *Arizona v. California*, 373 U.S. 546, 597-98 (1963); *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125 (1993) (Indian country consists of "lands set aide by whatever means for the residence of tribal Indians under federal protection"). Nor would Alaska's approach comport with a multitude of lower court decisions that have found Indian country in the absence of such a congressional designation. In *Youngbear v. Brewer*, 415 F. Supp. 807 (N.D. Iowa 1976), *aff'd*, 549 F.2d 74 (8th Cir. 1977) and *State v. Youngbear*, 229 N.W.2d 728 (Iowa), *cert. denied*, 423 U.S. 1018 (1975), the courts held that the Mesquakie Sac and Fox Settlement was Indian country despite the absence of any statute or order declaring the land to be a reservation. Similarly, the reservation of the Eastern Band of Cherokee has been treated as Indian country, despite the absence of a specific statute or executive order proclaiming the lands to be a reservation. *See United States v. Lossiah*, 537 F.2d 1250 (4th Cir. 1976); *United States v. Hornbuckle*, 422 F.2d 391 (4th Cir. 1970); *United States v. Parton*, 132 F.2d 886 (4th Cir. 1943); *United States v. Wright*, 53 F.2d 300 (4th Cir. 1931), *cert. denied*, 285 U.S. 539 (1932). And, in *State v. Dana*, 404 A.2d 551 (Me. 1979), *cert. denied*, 444 U.S. 1098 (1980), the court found the Peter Dana Point Indian Township was Indian country, although designated by state authorities through treaties never approved by the Federal Government. *See also United States v. Levesque*, 681 F.2d 75 (1st Cir.), *cert. denied*, 459 U.S. 1089 (1982) (same); R. Clinton et al. *American Indian Law* 117 nn.1 & 2 (3d ed.1991)(discussing cases).

[28] In short, in every case where the area in question has been the home of a federally recognized tribe, Indian country has been found, just as this Court so found in *John* and *Potawatomi*. Efforts by tribes to assert that lands (continued...)

at 46-47; *McGowan*, 302 U.S. at 539.

b. Congress has certainly "recogniz[ed] or establish[ed] a reasonably distinct location for the residence of [the Venetie] tribal Indians under federal protection." Cohen at 39. Venetie's aboriginal lands were set apart from the public domain under the rule of *Bates v. Clark*, 95 U.S. 204, 208 (1877) (holding unextinguished aboriginal title is Indian country). Later, that character was strengthened with the establishment of its Reservation. ANCSA aside, both courts below also found Venetie comprised a dependent Indian community. Pet. App. 31a, 67a. As discussed fully *infra* at 40-45, more recently Congress in ANCSA continued "recognizing or establishing a reasonably distinct location" for Venetie by ripening its title into full fee. Indeed, in directing that the reservation lands be conveyed to the Venetie corporations, the Secretary emphasized that the lands had already been "set aside for the use or benefit of their stockholders *prior to* the enactment of [ANCSA]." Ex. 78, Dkt. Nr. 109 (emphasis added). The lands remained with Venetie, the Native stockholders on whose behalf the lands had been previously set aside retained control over the lands, and the lands were given full protection from involuntary loss or taxation. Plainly, Congress has seen to it that Venetie's unceded lands remain reserved and set apart for its exclusive use and occupation. Today these tribal homelands remain in tribal ownership and under the uninterrupted governance of the Venetie Tribe.

Setting aside Venetie's unceded lands for the Tribe is precisely what Congress had in mind, for it conceived of the settlement within the very same framework as all other Indian land settlements:

> It has been the consistent policy of the United States Government in its dealings with Indian Tribes to grant to them

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(...continued)
unilaterally acquired by tribes and situated outside a tribe's homeland qualify as Indian country have failed, *Buzzard v. Oklahoma Tax Comm'n.* 992 F.2d 1073 (10th Cir. 1993); *United States v. Adair*, 111 F.3d 770 (10th Cir. 1997), answering the suggestion of petitioner and its *amici* that the Circuit cases sanction uncontrolled and unilateral creation of dependent Indian communities anywhere in the country.

title to a portion of the lands they occupied, to extinguish the aboriginal title to the remainder of the lands by placing such lands in the public domain, and to pay the fair value of the titles extinguished.

H.R. Rep. No. 92-523 at 5-6 (1971)("1971 House Report"). There can be no doubt but that Congress "granted to [Venetie] title to a portion of the lands [it] occupied."[29]

c. That Congress continued to "set aside" Venetie's lands for the Venetie Tribe is consistent with the diverse array of post-1971 congressional enactments generally referring to ANCSA corporate lands as lands under the territorial jurisdiction of the local tribe. Because these enactments and ANCSA deal with the same subject–ANCSA lands–they must be read *in pari materia*. *Haig v. Agee*, 453 U.S. 280, 300-01 (1981).

For instance, in the Native American Programs Act of 1974, as amended, 42 U.S.C. § 2991-2992d., Congress addressed Alaska Native village lands as subject to village tribal jurisdiction.[30] The

[29] The same cannot be said of the millions of acres of regional corporation investment lands that were not set aside under ANCSA for particular villages, but instead are managed for the benefit of an entire region's Native population. *Supra* at 14, n.12. For this reason alone (among many others), the issue *amicus* Koniag would now inject into the case is simply not present. And as for village corporation lands of other villages, such lands would have to meet the strict standards articulated here, including being a part of a "distinctly Indian community." Lands in abandoned villages and lands situated miles away due to ANCSA's "deficiency" withdrawals, 43 U.S.C. § 1610(a)(3), would likely never meet this test.

[30] Under 1990 amendments to that Act, the ANA provides financial assistance to Alaska Native villages to "improv[e] the capability of the governing body of the Indian tribe to regulate environmental quality pursuant to Federal and tribal environmental laws," 42 U.S.C. § 2991b(d)(1), including "development of tribal laws on environmental quality," "enforcement and monitoring of environmental quality laws," and "training and education of [tribal] employees responsible for enforcing or monitoring compliance with environmental quality laws." *Id.* § 2991b(d)(2)(A) – (C). For other programs authorized by the Act, no ANA grant may be awarded to any grantee for a "project . . . which is to be carried out on or in an Indian reservation or *Alaska Native village*, unless a plan setting forth the project has been submitted to the governing body of that reservation or village and the plan has not been disapproved by the governing body within thirty days of its submission." *Id.* § 2991f(a) (italics

(continued...)

Administration for Native Americans (ANA) annually funds Alaska tribal environmental regulation initiatives, as well as environmental cleanup initiatives on former Defense Department lands. ANA also supports a wide range of other Alaska tribal territorial governance activities, including the development of tribal civil and criminal "codes and tribal court systems" and the strengthening of "village government control of land management, including land protection, through coordination of land use planning with village corporations and cities, if appropriate."[31] In the environmental arena, the Oil Pollution Act of 1990 acknowledges the role Alaska Native villages play as natural resource trustees in the event oil spills affect lands "belonging to, managed by, controlled by, or appertaining to such Indian tribe." 33 U.S.C. §§ 2701(15), 2706(b)(4). The Comprehensive Environmental Response, Compensation and Liability Act similarly includes Alaska Native villages as tribes that must be treated as states in connection with various environmental regulation activities in Indian country (such as the clean-up of hazardous waste sites and responding to hazardous spills). 42 U.S.C. §§ 9601(36), 9626. And the Clean Air Act puts all tribes exercising "substantial governmental duties and powers" over any "areas within the tribe's jurisdiction," including Alaska Native villages, on an equal footing with states in connection with various initiatives. 42 U.S.C. §§ 7601(d), 7602(r). Congress has also provided special federal mortgage insurance if the mortgage is executed by an "Alaska Native tribe" and the property is located on "land acquired by Alaska Natives under [ANCSA] or any other land acquired by Alaska Natives pursuant to statute by virtue of their unique status

(...continued)

added). The italicized language delineating the territory of a Native village includes Settlement Act lands "under the jurisdiction" of the village. *Id.* § 2992c(2).

[31] *See, e.g.*, Administration for Native Americans; Availability of Financial Assistance, 60 Fed. Reg. 46,598, 46,603 (1995) (a special ANA "Alaska Native Initiative" begun in the early 1980s).

as Alaska Natives." *See* 12 U.S.C. § 1715z-13(a)(1), (i).[32] As reflected *infra* 110a-120a, some 50 discrete federal enactments address Alaska Native villages as possessed of territorial jurisdiction in their communities.

d. Finally, the continuation of Venetie's Indian country status after the conveyance of its lands to the local Native village corporations is consistent with Congress's treatment of tribes and village corporations. Congress frequently refers to the ANCSA corporations and the recognized village tribes interchangeably, furthering the original goal of establishing each village corporation to engage in pursuits "for and on behalf of" the local tribe, 43 U.S.C. § 1602(j).[33]

2. Venetie's "dependent Indian community" status is consistent with the ownership of its lands in fee status.

In codifying *Sandoval*, Congress expressed its intent that the "the simple ownership of lands by a federally-recognized, dependent Indian tribe is sufficient to bring the lands so held within

[32] *See also* Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 *et seq.*, recognizing the jurisdiction of "any Alaska Native village" over child custody matters arising both within and outside the "Indian country" occupied by their villages. 25 U.S.C. § 1903(8). Under § 1918(b)(2), the Act also recognizes the tribal option to reassume the "exclusive" civil adjudicatory jurisdiction over domestic relations matters that is enjoyed by tribes in states not covered by Public Law 280, *Native Village of Venetie v. State of Alaska*, 944 F.2d 548, 555-56 (9th Cir. 1991). Exclusive tribal jurisdiction over domestic matters under the Act of course only exists in Indian country. *Id.*

[33] *See, e.g.*, 15 U.S.C. § 637(a)(13); 25 U.S.C. §§ 450b(b), 1603(d), 3501(2); 42 U.S.C. §§ 8802(12), 11472. Congress understood well this close relationship:

> Section 11 [later 43 U.S.C. § 1607] deals with the traditional organizational unit in Native society, the village. Over 70 percent of all Natives in Alaska live in these villages, and they provide one of the strongest loyalties felt by the Native people. Because the Committee felt that it was on this level that Native self-determination could best be maximized, this section provides the procedures for the organization of villages into corporations able to democratically decide among the various options open to Native people under the Act.

1971 Senate Report 132.

the ambit of the phrase 'Indian country.'" R. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 507 (1976). "As long as the indicia of dependence exist and the Native people continue to reside together in a reasonably distinct location recognized as their residence by the federal government, they should be considered 'dependent Indian communities.'" Cohen at 766. Tribal ownership of fee land is fully consistent with this status.

Alaska's insistence that a dependent Indian community must be a reservation or owned in trust by the United States severs § 1151 from its historic roots. Further, it would nullify the term and collapse subsection (b) into subsection (a), which already provides that trust and reservation lands qualify under subsection (a). *John*, 437 U.S. at 647-53; *Potawatomi,* 498 U.S. at 509-11. This interpretation is at odds with the time-worn rule that a statute must not be construed so as to render any one part redundant or superfluous. *United States v. Alaska*, 117 S.Ct. 1888, 1918 (1997); *Walters v. Metro. Educ. Ent. Inc* , 117 S.Ct. 660, 664 (1997). Moreover, Alaska's standard would call into question the continued Indian country status of other tribes across the country who likewise own their homelands in fee. *See, e.g., Sandoval* (New Mexico Pueblos); *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832 (1982); *United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971) (Navajo bands); *Indian Country, U.S.A., Inc. v. Oklahoma Tax Comm'n*, 829 F.2d 967 (10th Cir. 1987) (Oklahoma Tribes); *New York Indians v. United States*, 170 U.S. 1 (1898)(New York Tribes).[34]

Petitioner is wrong that § 1151 is some "narrow" category with "limited scope," affecting "only a tiny portion of Indian country nationwide." Pet. Br. 19-20. *Sandoval* alone established that twenty Pueblos with 8,000 Indians living on some 17,000 acres

[34] Not only has no rule of law ever required that tribal governmental jurisdiction over Indian land is limited to instances where the land is owned by the United States in trust for the Tribe, *Merrion*, 455 U.S. at 143, but the very suggestion conflicts with the doctrine of inherent tribal sovereignty. Indeed, it would put a tribe with relatively greater ownership rights in a weaker governmental position than one whose land is owned by and under the control of the Federal Government.

each, or roughly 340,000 acres total, were dependent Indian communities. 231 U.S. at 38-39; *see also* Clinton, 18 Ariz. L. Rev. at 507 n.27.

In the leading tribal tax cases, the only difference between Venetie and the Jicarilla Apache (in *Merrion*), or the Navajo (in *Kerr-McGee*), is that Venetie's unceded reservation lands are no longer held in trust but in common by the Tribe. The distinction is immaterial. In codifying § 1151, Congress eschewed technical distinctions in land tenure and "defined Indian country broadly." *Oklahoma Tax Comm'n. v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993). "Indian country" does not turn on the label used, nor on the manner by which the lands were acquired. *McGowan*, 302 U.S. at 538-39. Indeed, "the statutory definition . . . was intended to eliminate reliance on land titles in these matters." Cohen at 766. Thus, this Court only asks whether an "area has been validly set apart for the use of the Indians as such, under the superintendence of the Government." *Potawatomi*, 498 U.S. at 511 (internal quotations omitted).

III. ANCSA DID NOT TERMINATE VENETIE'S AUTHORITY TO GOVERN ITS OWN AFFAIRS IN ITS ANCESTRAL LANDS.

Alaska insists not only that Venetie's continued Indian country status is somehow inconsistent with ANCSA, but that ANCSA actually terminated that status–although it concedes Congress never said so. It thus contends ANCSA implicitly extinguished Venetie's territorial authority in Indian country. This proposition cuts directly against ANCSA's fundamental purpose and this Court's precedents.

As the historic record shows (*supra* at 12-17), ANCSA was a land claims statute adopted as an integral part of the Self-Determination Era. Taken in that context, ANCSA's plain words cannot fairly be read as an implicit termination of the very village

tribal communities the Act was intended to benefit.[35] Indeed, this Court's precedents demand that before any statute be construed to reduce or eliminate the territorial jurisdiction of a tribe, "Congress [must] clearly evince [such an] intent." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)(quotations omitted); *see also DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975); *Mattz v. Arnett*, 412 U.S. 481, 505 (1973). In reviewing the statute the Court gives "the broadest possible scope" to the canon that "legal ambiguities are resolved to the benefit of the Indians," *DeCoteau*, 420 U.S. at 447, a rule first articulated in *Worcester*, 31 U.S. at 582 (M'Lean, J., concurring); *see also South Dakota v. Bourland*, 508 U.S. 679, 687 (1993) ("'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit'") *quoting County of Yakima v. Yakima Nation*, 502 U.S. 251, 269 (1992); *United States v. Santa Fe Pac. R. R. Co.*, 314 U.S. 339, 354 (1942); *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 89 (1918); *Choate v. Trapp*, 224 U.S. 665, 675 (1912); Cohen at 224. As Justice Scalia noted in *Yakima*, this is "a principle deeply rooted in this Court's Indian jurisprudence," 502 U.S. at 269.

Termination of a tribe's territorial integrity further requires either "plain and unambiguous" language, *Santa Fe*, 314 U.S. at 346, such as where the land is "ceded" and returned to the "public domain," *Hagen*, 510 U.S. 399 at 412-13, or "[w]hen events surrounding [the enactment] ...*unequivocally* reveal a widely held contemporaneous understanding" that the tribe's territory would be lost, *Solem*, 465 U.S. at 471 (emphasis added), reflecting the Indians' understanding too. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970). "To a lesser extent" the Court has also looked to subsequent events and congressional treatment, and "[o]n a more pragmatic level" to who actually resides on the lands–tribal members or outsiders. *Solem*, 465 U.S. at 471; *see generally Hagen*, 510 U.S. at 410-12 (majority), 422-23

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[35] Even silence or ambiguities in termination era legislation must be resolved in favor of continued tribal authority, *Bryan v. Itasca County*, 426 U.S. 373, 388 (1976); *a fortiori* the same must hold true in the context of quintessential self-determination legislation like ANCSA.

(Blackmun, J., dissenting) (reviewing canons). Even where Congress has "anticipated the imminent demise" of a tribe and sought to "facilitate the process" the Court has cautioned against "extrapolat[ing]" a disestablishment if the statutory language is insufficient. *Solem*, 465 U.S. at 468-69.[36]

Congress is presumed to have legislated against the backdrop of these precedents, *e.g., Alaska,* 117 S.Ct. at 1907, and there is every reason to believe Congress was aware of these principles in 1971–given this Court's reaffirmation of them in *Menominee Tribe of Indians v. United States,* 391 U.S. 404, 412-413 (1968), as ANCSA was being drafted. To prevail Alaska must show Congress clearly terminated Venetie's Indian country status. Here that effort fails.[37]

A. The Technical Revocation of Venetie's Reservation and the Conversion of its Lands into Fee Title Did Not Terminate Venetie's Authority to Govern its Own Affairs in its Territory.

1a. Alaska would have this Court read 43 U.S.C. § 1618 as equivalent to a disestablishment or termination provision, since by its terms the Venetie Reservation was "revoked." But the State's argument fails to consider what Congress actually accomplished. At the same time § 1618(a) "revoked" Venetie's

[36] The panel below correctly applied these canons and disregarded the petitioner's attempt to weaken the rule in reviewing ANCSA. The canons rest not on how well or badly the Native position is represented in dealings with Congress, but on the trust relationship and the superior power of Congress in Indian affairs. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985); *Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886); *United States v. Rickert*, 188 U.S. 432, 437-38 (1903); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-67 (1903). This superior power is particularly compelling in ANCSA, where even petitioner must recognize Congress acted purely "as a matter of grace," *Tee-Hit-Ton,* 348 U.S. at 282, something Congress well understood. 1971 House Report 5.

[37] Although Alaska would now reframe the question as whether ANCSA "created" Indian country, Pet. Br. 38, the question presented by the State and considered below was whether ANCSA was a termination act–did it extinguish Venetie's existing Indian country.

Reservation, § 1618(b) authorized the Tribe's two villages, acting through village corporations and in lieu of all other benefits, "to acquire title to the surface and subsurface estates" in the Reservation that had been "set aside for the use or benefit of its stockholders or members." While Congress technically "revoked" the "reservation" status, the land was not thereby "allotted," "restored to the public domain," or opened to outside settlement in any way. *Compare Hagen,* 510 U.S. at 412. To the contrary, the undivided land *remained* communally owned by Venetie, and was *not* to be ceded: "the lands were withdrawn from reservation or reserve status for the purpose of selection" by the Venetie corporations in fee. *Ollestead v. Native Village of Tyonek*, 560 P.2d 31, 35 (Alaska 1977).

Moreover, unlike the completely extinguishable title Venetie held before ANCSA under a revocable Secretarial reservation, *Hynes*, 337 U.S. at 103, § 1618(b) assured Venetie it would receive full and unrestricted "title to the surface and subsurface estates" fully protected under the Fifth Amendment. To be sure, opting out of ANCSA's general scheme came at a price: Venetie would entirely bypass ANCSA's generous compensation benefits and the Act's regime for regional stockholder benefits. For all intents and purposes, Venetie would therefore not be affected by (and would hardly benefit from) the Act–save in the permanent protection of its lands.[38]

[38] Alaska alludes to the municipal reconveyance provisions of § 1613(c)(3) as indirect evidence Congress thought about municipalities and therefore implicitly intended no governmental role for the tribes. Pet. Br. 9, 31, 41. But Venetie secured its fee patent under § 1618(b), and the municipality provision of § 1613(c)(3), by its own terms applies only to villages receiving patents under § 1613(a) or (b). Section 1613(c)(3) therefore has no bearing on Venetie (whatever its silent implications may be argued to be elsewhere). Moreover, state-chartered municipalities are consistent with and common throughout Indian country. *E.g., Seymour v. Superintendent*, 368 U.s. 351, 357 (1962); *South Dakota,* 665 F.2d at 840-41; *Shakopee v. City of Prior Lake*, 771 F. 2d 1153 (8th Cir. 1985), *cert denied*, 475 U.S. 1011 (1986). *See* Br. *Amici Curiae* Alaska Federation of Natives *et al* 23.

b. These provisions stand in stark contrast to the disestablishment cases so heavily relied upon by Petitioner.[39] In no case has this Court ever found a diminishment or disestablishment in the absence of tribal lands being allotted, restored to the public domain, or otherwise disposed to non-Indians. *E.g.*, *Hagen*, 510 U.S. at 413; *Bourland*, 508 U.S. at 692; *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). Indeed, the Court has recognized that *within* disestablished reservations, *unceded* Indian lands remain Indian country even as other lands return to the public domain. *DeCoteau*, 420 U.S. at 446; *Pelican*, 232 U.S. at 449.

c. ANCSA's legislative history echoes the congressional intent to *benefit* 'opt-out' tribes like Venetie, not terminate their tribal authority over their territory. The reservation-revocation provision first appeared in a 1967 Administration-sponsored bill transferring the "revoked" lands to the reservation tribe in trust for 25 years, and thereafter in fee. *See* 1968 Senate Hearings 18 (reproducing S. 1964, § 3). Plainly, this bill, because it would have created trust land, used the term "revoked" in a manner consistent with continued "Indian country" status, rather than with disestablishment. *See Potawatomi*, 498 U.S. at 511 (18 U.S.C. § 1151(a) includes trust lands). This use of the term "revoked" survived to final enactment. At no time did Congress indicate any intent to deprive a tribe in Venetie's situation of its inherent authority to govern its lands by "revok[ing]" its reservation. Alaska Senator Gravel explained this well:

"Under the committee bill all reservations in Alaska are

[39] The State relies on each of this Court's disestablishment cases, laying particular emphasis on *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1986). But none of these cases comes even close to the factual and legal history present here, as *Catawba* illustrates. There, by a 1959 termination-era act, Congress revoked the tribe's constitution, terminated all special Indian services to the tribe, disposed of all tribal assets to the tribal membership and removed the tribe and its members from the coverage of all federal legislation benefiting Indian tribes. *See Catawba*, 476 U.S. at 504-05. A case more dissimilar from Congress's treatment of the Venetie Tribe would be difficult to imagine: Venetie's tribal structure and constitution survived ANCSA, all federal Indian services remained in place, and the Tribe (along with its members) has remained within the coverage of all special federal Indian legislation.

revoked, *unless the village corporations located within the reservation elect to take fee title to the reservation.* If Natives do elect to take title to the reservation, they will not participate in the land selection procedures of the bill, nor share in the monetary settlement."

117 Cong. Rec. 46,967 (1971)(emphasis added).

Contrary to Petitioner's misreading of the legislative history, it is plain Congress intended to foster *greater* autonomy for Venetie by placing its reservation lands in fee ownership: "[T]he revocation of these reservations is in keeping with the expressed desire of the Native people of Alaska to be free of the administrative oversight and wardship of the Bureau of Indian Affairs...." 1970 Senate Report 157. Fee title achieved that specific purpose. The problem Congress perceived with reservations was not with tribal sovereignty but with oppressive BIA paternalism.[40] As petitioner put it, "Indians did not own or control the land. Rather, the land was held in 'trust' for them by the federal government, and any action concerning the land was subject to exclusive federal control." Pet. Br. 4. So long as the Federal Government owned Venetie's reservation in trust, Venetie could not alienate or mortgage its land, or even lease or otherwise develop the land without BIA review, interference and uncertain approval. Economic self-determination was limited. Congress believed the solution was to convey full fee title, thereby eliminating what Congress viewed as the BIA's repressive paternalism, and "maxim[izing] participation by Natives in decisions affecting their rights and property," 43 U.S.C. § 1601(b). To achieve that result did not require the termination of the Tribe's authority to govern the land.[41]

[40] "[I]n determining the meaning of the statute, [the Court] must look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990).

[41] It is for this reason alone–ANCSA's command for fee title–that Interior rejected Venetie's 1978 request to immediately return its land to trust status (and thus avoid interim administration by Interior pending patent), not because of any perception that Venetie no longer governed its lands. JA 142-43.

(continued...)

The Native leadership struggled against the Interior Department to secure fee title. For a time, Interior insisted that all lands be held in trust for at least 25 years, as reflected in bills introduced at its request. *See, e.g.*, S. 1964, 90th Cong., 1st Sess. (1967) and S. 3586, 90th Cong., 2d Sess. (1968) *reproduced in* 1968 Senate Hearings 517. But as bills containing greater Native input reflected, at most Natives would agree that "trust land" status could be a tribal option.[42] By final enactment, the "fee title" provision fostering greater tribal self-determination and renouncing BIA paternalism prevailed. There is no incompatibility between this beneficent purpose–greater Native control over the land–and continued tribal jurisdiction over the land, particularly where (as in Venetie's case) the Tribe has always governed its own affairs.

The perceived problem never was the presence of sovereign tribal governments– whose only interest would obviously be to foster local control and economic development. Petitioner's every citation to hearing testimony disavows the reservation-trust regime of BIA control;[43] on an issue where silence truly counts, not one quote mentions (much less suggests terminating) continued tribal

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(...continued)
That Venetie might have preferred to return its land to trust status does not detract from Congress's decision that fee title would better maximize tribal autonomy.

[42] *See, e.g.*, S. 2906, § 211, *reproduced in* 1968 Senate Hearings 9, 105 (Task Force commentary explaining same). Contrary to Petitioner's mischaracterization of Mr. Jackson's testimony, Pet. Br. 8, Natives only opposed any absolute mandate that all village lands first go into trust. The Native proposal clearly was to "permit[] a trust to be established at the option of the native group," 1968 Senate Hearings 579 (B. Jackson).

[43] Excessive BIA control is what led to reservations being viewed "as incompatible, with maximum economic self-determination," why one attorney testified Alaska Natives were "vehemently antireservation," why one congressman in 1971 remarked that bills under consideration "eschew the reservation or trust concept," and why one committee report sought "to avoid perpetuating in Alaska the reservation and trustee system." Pet. Br. 28-29 n.17, 30 n.20, 40-41 n.30 (selecting excerpts from hearings, debates and the 1971 Senate Report).

territorial jurisdiction.[44]

B. ANCSA's Placement of Venetie's Lands in Native Corporations Established by the Tribal Villages, Rather Than Directly in the Hands of the Tribe, Did Not Terminate Venetie's Authority to Govern its Territory.

1a. There is nothing inconsistent between the formation of village corporations under §§ 1602(j) and 1607, and the continuation of tribal jurisdiction over village lands. To the contrary, § 1602(j) plainly contemplates that the local village tribe is to organize the corporation as a profit or nonprofit entity, and that the resulting corporation is "to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets *for and on behalf of a Native village*." Whether profit or non-profit, the corporation is thus an economic engine with a mission to manage village assets. Such a provision hardly bespeaks the total separation in entities, one Native and the other merely a "private business corporation"–much less a destruction of the village as a tribal government.[45]

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[44] As Alaska Congressman Nick Begich observed, "The bill is sensitive to the heritage and culture of Alaska's Natives and does not impose either conditions or structures which would require abandonment of a proud past. The family and the village, which are the cornerstones of the culture, are protected and enhanced by this bill," 117 Cong. Rec. 36,866 (1971) later adding "In my view, the final bill remains sensitive to the Native Village and its needs...." The "legislation focuses on self-determination, [and] village autonomy...." 117 Cong. Rec. 46,789 (1971). *See also supra* at 17, n.17 (remarks of Senator Metcalf). Petitioner's reliance (Pet. Br. 36, n.25) on a closed executive session exchange not known to Congress, on provisions of a bill not enacted (H.R. 10367, which at the time of exchange would have transferred all Native lands to state municipal corporations) and on the application of state, not tribal law, leads nowhere.

[45] The situation with the four "urban corporations" like *amicus* Shee Atika, Inc., formed under 43 U.S.C. § 1613(h)(3), could not be more dissimilar. These were not "distinctly Indian communities" at all, but urban non-Native communities that could not qualify under § 1610(b)(3). Native members of those corporations were considered to have no compensable aboriginal claims

(continued...)

b. By following ANCSA's regime, the Venetie Tribe kept its lands under Native ownership and control. The two village corporations were formed by the Tribe to hold the land "for and on behalf of" the villages. The tribal members were designated as the shareholders to control the land, and their stock was made inalienable. It could not be "sold, pledged, subjected to a lien or judgment execution, assigned in present or future, or otherwise alienated." Pub. L. 92-203, §§ 7(h)(1), (2), 8(c), 85 Stat. 688, 691-694. Only Venetie members or their descendants could exercise voting rights. *Id.* Although the land was not placed under a "trusteeship," it was given absolute federal protection from involuntary loss through taxation, or judgment execution so long as it remained undeveloped. *Id.* § 21(d), 85 Stat. 713. Even without considering later amendments, it is difficult to conceive of a more secure way for Congress to have maintained Venetie's lands in Native hands while capitalizing on the perceived advantages of the corporate form–which, of course, was Congress' intent to begin with: to accomplish a settlement "in conformity with the real economic and social needs of Natives." 43 U.S.C. § 1601(b). This is precisely the conclusion reached in the leading

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(...continued)
and therefore received no compensation at all under the Act. The corporations were not established "for and on behalf of a village" but merely to provide economic benefits to local Native residents regardless of tribal affiliation. In the case of *amicus* Shee Atika, there has never been an identity between the urban corporation's members and the local tribal membership. Their ANCSA lands are situated outside of (and often quite far from) the municipalities. Under the standard articulated by the court of appeals, Shee Atika's distant lands–not even a part of the non-Indian community, much less any "distinctly Indian community," could never be determined to be within some "dependent Indian community" set apart for the benefit of the local Sitka Tribe.

Amicus Koniag's suggestion that in 1971 no such identity ever existed between tribal memberships and village corporation memberships due to the alleged "restrict[ion] of voting membership only to [residents]," *Amicus* Br. at 5 n.18, is contrary to the very facts of this case and confuses tribal membership eligibility (for most tribes is a birthright) with voter eligibility (dependent on such factors as minimum age requirements and the like).

treatise on federal Indian law. Cohen at 766-67.[46]

c. Section 1601(b) does not alter this analysis. Congress understood well that in 1971 it was setting aside ANCSA lands for Natives as such, even as it appeared to disavow a desire to do so "permanent[l]y." 43 U.S.C. § 1601(b). While far from clear, Congress's intent in 1971 may well have been for the closed Native corporations to be opened to the public after 20 years, with all the various "special tax privileges" expiring at that time.[47] But whatever its initial intent, Congress charted a clear course when, within five years, it amended the Act in what would become a continuing process of protecting and extending the "Native" character of the ANCSA corporations and the unique rights, privileges and protections they enjoy, *supra* at 17-18. By these measures, protections that in 1971 Congress may have considered temporary ultimately became "permanent"–unless Congress should one day change course.[48]

d. So closely allied are the village tribes and the ANCSA corporations that time and again since 1971 Congress has

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[46] *See also* D. Blurton, *ANCSA Corporation Lands and the Dependent Indian Community Category of Indian Country*, 13 Alaska L. Rev. 211, 229-36 (1996); G.G. Biggs, *Is There Indian Country in Alaska? Forty-Four Million Acres in Legal Limbo*, 64 U. Colo. L. Rev. 849 (1993); P. Thompson, *Recognizing Sovereignty in Alaska Native Villages After the Passage of ANCSA*, 68 Wash. L. Rev. 373, 383-90 (1993).

[47] *See* 1971 Senate Report 109 ("Other provisions of the bill do, of necessity, make racial distinctions and do grant special tax relief for limited periods of time. These provisions are of limited duration and are necessary to effectuate a settlement which, because of its very nature, is based on ethnic consideration,") (explaining what became § 1601(b)). Section 1601(b) comes almost verbatim from S. 1830, 91st Cong., 2nd Sess. (1970), a measure which contemplated no Native institutions or tax privileges at all, since all lands were to be conveyed to state municipal governments. Although Congress rejected this approach, § 1601(b) survived. This history clouds Congress's intent. J. Walsh, *Settling the Alaska Native Claims Settlement Act*, 38 Stan. L. Rev. 227, 244-46 (1985).

[48] Alaska Senator Murkowski put the issue well: "ANCSA is a 'living' settlement. It is not a fixed formula which is cast in stone and incapable of adopting to changing reality. Rather, it is a flexible framework designed to provide Alaska Natives with a maximum amount of self-determination as they strive to balance the needs of their present and future generations." 133 Cong. Rec. 37,722 (1987).

authorized either or both entities to carry out various federal initiatives without distinction. *Supra* at 36. It has spoken of tribal regulation of the corporation land. *Supra* at 34-36. And it has increasingly retooled the law governing village corporations to the point that in effect they are today perpetual Native entities. *Supra* at 17-18. The state corporate form, standing alone, does nothing to support the notion that Congress in ANCSA somehow implicitly extinguished tribal jurisdiction over corporation lands, any more than if Congress had permitted the village tribes to organize nonshareholder corporations under federal or tribal law (as it did for Venetie and other tribes in the 1930s under the IRA, 25 U.S.C. § 477).

e. Once again, the legislative history confirms this reading of ANCSA. The concept of tribal village corporations was developed by a 1968 Task Force partly composed of several Native leaders. Under its bill, S. 2906, 90th Cong., 2d Sess. (1968) village lands would have gone not directly to tribes, but to new tribal enterprises formed either under the IRA, or under a new state law that would provide an array of special protections for 100 years (including inalienable stock). 1968 Senate Hearings 2-16, 74-78, 102-15, 491-98 (printing the bill, parallel state legislation and related materials). Each village–termed "an incorporated tribal group"–would also choose whether its 'corporate' lands would be held in trust or in fee. Notwithstanding petitioner's use of ellipses and omitted text to suggest otherwise, the "incorporated tribal group" was expressly understood to be different from any state "municipal corporation" that might already exist in a village.[49]

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[49] 1968 Senate Hearings 75 (Task Force Report) ("[T]he village-as-a-municipal-corporation shall be separated from the village-as-an-incorporated-tribal-group.") In its effort to convince the Court Alaska Natives intended to fully assimilate and embrace state law, and abandon tribal institutions, petitioner omits language essential to understanding the Native position in 1968. This position favored a village corporation in significant measure because it would *not* be a state municipality:

> The land and the money will not be given to villages as municipal cities and will not be given to the villages as tribal entities. Instead, business

(continued...)

Key to the Native proposal was that village corporations would provide uniquely portable benefits: as shareholders, individual tribal members could continue to reside on their tribal homelands or travel wherever they might choose, without ever losing their shareholder benefits. In this sense ANCSA would neither compel nor coerce Native people to remain in their villages.[50] This is the meaning of the village corporation concept that survived to final enactment. *See* 1970 Senate Report 136.

f. ANCSA and its considerable legislative history are devoid of any hint that in seeking the investment power of local corporations with portable shareholder benefits, tribes silently intended to self-destruct by eliminating their preexisting authority

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(...continued)

> corporations will be formed by the village members and the land and the money will go to these business corporations. This is very important because it separates the municipal corporation or the native group as a municipal corporation from the native group as a tribal entity.

1968 Senate hearings 575 (Barry Jackson) (underlined language omitted at Pet. Br. 35). Nor does Petitioner share with the Court that S. 2906, the proposal advanced by Mr. Jackson and the Natives, contemplated either state corporations or *tribal* corporations established under 25 U.S.C. § 477, terming both "tribal enterprise[s]." This is plain both in the very next paragraph (in addition to the bill itself), and in an earlier paragraph petitioner only partly quotes. 1968 Senate Hearings 89 ("[W]e have separated the native village as a municipal corporation from the native village as an incorporated tribal enterprise. And the lands and the money will be going to the incorporated tribal entity which will be gradually transformed into an ordinary business corporation with shares fully alienable. This is a gradual process. It takes about a hundred years to accomplish.")

[50] Petitioner quotes–but does not explain–Barry Jackson's remark that the village corporation vehicle was developed so as not to "freeze the natives to the land and to the villages and make it difficult or impossible for them to be mobile in American society today." Pet. Br. 35 (quoting 1968 Senate Hearings 575); *see also* Pet. Br. 29 n.18, 41, 90 (additional quotations of Mr. Jackson). Five pages later Mr. Jackson explains the portability idea: "[This] was a factor behind the adoption of the business corporation form because the stockholder can move anywhere and still retains...ownership interest in his corporation....[Y]ou will be able to share in the benefits of your corporation...whether you live in Minto or whether you work in Fairbanks or whether you are working outside Alaska even." 1968 Senate Hearings 580.

over their ancestral lands. In the case of Venetie, neither Congress's "plain and unambiguous" language, *Santa Fe*, 314 U.S. at 346, nor the "widely held, contemporaneous understanding," *Solem*, 465 U.S. at 471, "clearly evince" an intent to eliminate the Tribe's territorial sovereignty. *Id.* at 470. Rather, Congress's well-established intent to renounce BIA paternalism, maximize Native village autonomy, and preserve the Federal Government's protective role as trustee fully supports Venetie's continued sovereignty over its remote homelands.

CONCLUSION

The Venetie People seek only to continue governing their own affairs in their vast remote homeland, as they have done for centuries. For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

Treaty With Russia
March 30, 1867
Article III, 15 Stat. 539, 542

The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

Act of May 17, 1884
§ 8, c.53, 23 Stat. 24, 26

SEC. 8. That the said district of Alaska is hereby created a land district, and a United States land-office for said district is hereby located at Sitka * * * . *Provided*, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress: * * * *And provided also*, That the land not exceeding six hundred and forty acres at any station now occupied as missionary stations among the Indian tribes in said section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which said missionary stations

respectively belong until action by Congress. But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States.

Act of March 3, 1891
§ 15, c.561, 26 Stat. 1095, 1101

SEC. 15. That until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in Southeastern Alaska, on the north side of Dixon's entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans who have recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may prescribed from time to time by the Secretary of the Interior.

Act of June 6, 1900
§§ 1, 15, c. 786, 31 Stat. 321, 330

SEC. 1. That the territory ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven, and known as Alaska, shall constitute a civil and judicial district, the government of which shall be organized and administered as hereinafter provided. The temporary seat of government of said district is hereby established at Juneau: *Provided*, That the seat of government shall remain at Sitka until suitable grounds and buildings thereon shall be obtained

by purchase or otherwise at Juneau.

* * *

SEC. 27. The Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now actually in their use or occupation, and the land, at any station not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes in the section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which the missionary stations respectively belong, and the Secretary of the Interior is hereby directed to have such lands surveyed in compact form as nearly as practicable and patents issued for the same to the several societies to which they belong; but nothing contained in this Act shall be construed to put in force in the district the general land laws of the United States.

Act of May 17, 1906
c. 2469, __ Stat. 197

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of nonmineral land in the district of Alaska to any Indian or Eskimo of full or mixed blood who resides in and is a native of said district, and who is the head of a family, or is twenty-one years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and

nontaxable until otherwise provided by Congress. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding one hundred and sixty acres.

Act of June 2, 1924
c. 233, __ Stat. 253

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.

Act of May 25, 1926
c. 379, 44 Stat. 629-630

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where, upon the survey of a town site pursuant to section 11 of the Act of March 3, 1891 (Twenty-sixth Statutes, page 1095), and the regulations of the Department of the Interior under said Act, a tract claimed and occupied by an Indian or Eskimo of full or mixed blood, native of Alaska, has been or may be set apart to such Indian or Eskimo, the town site trustee is authorized to issue to him a deed therefor which shall provide that the title conveyed is inalienable except upon approval of the Secretary of the Interior: *Provided,* That nothing herein

contained shall subject such tract to taxation, to levy and sale in satisfaction of the debts, contracts, or liabilities of the patentee, or to any claims of adverse occupancy or law of prescription: *Provided further*, That the approval by the Secretary of the Interior of the sale by an Indian or Eskimo of a tract deeded to him under this Act shall vest in the purchaser a complete and unrestricted title from the date of such approval.

SEC. 2. That whenever the Secretary of the Interior shall determine that it would be to the interest of the Indian or Eskimo occupant of land described in the preceding paragraph, he is authorized to extend the established streets and alleys of the town site upon and across the tract, and the deed issued to such occupant under this Act shall reserve to the town site the area covered by such streets and alleys as extended.

SEC. 3. That whenever he shall find nonmineral public lands in Alaska to be claimed and occupied by Indians or Eskimos of full or mixed blood, natives of Alaska, as a town or village, the Secretary of the Interior is authorized to have such lands surveyed into lots, blocks, streets, and alleys, and to issue a patent therefor to a trustee who shall convey to the individual Indian or Eskimo the land so claimed and occupied, exclusive of that embraced in streets or alleys: *Provided*, That any patent or deed to be issued under this section shall be subject to all the provisions, limitations, and restrictions of section 1 of this Act with respect to Indian and Eskimo claims to land occupied by them within the limits of town sites established or to be established under said Act of March 3, 1891.

SEC. 4. That the Secretary of the Interior is authorized to prescribe appropriate regulations for the administration of this Act.

Act of May 25, 1926
c. 379, 44 Stat. 629

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where, upon the survey of a town site pursuant to section 11 of the Act of March 3, 1891 (Twenty-sixth Statutes, page 1095), and the regulations of the Department of the Interior under said Act, a tract claimed and occupied by an Indian or Eskimo of full or mixed blood, native of Alaska, has been or may be set apart to such Indian or Eskimo, the town site trustee is authorized to issue to him a deed therefor which shall provide that the title conveyed is inalienable except upon approval of the Secretary of the Interior: *Provided*, That nothing herein contained shall subject such tract to taxation, to levy and sale in satisfaction of the debts, contracts, or liabilities of the patentee, or to any claims of adverse occupancy or law of prescription: *Provided further*, That the approval by the Secretary of the Interior of the sale by an Indian or Eskimo of a tract deeded to him under this Act shall vest in the purchaser a complete and unrestricted title from the date of such approval.

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patent therefor to a trustee who shall convey to the individual Indian or Eskimo the land so claimed and occupied, exclusive of that embraced in streets or alleys: *Provided*, That any patent or deed to be issued under this section shall be subject to all the provisions, limitations, and restrictions of section 1 of this Act with respect to Indian and Eskimo claims to land occupied by them within the limits of town sites established or to be established under said Act of March 3, 1891.

SEC. 4. That the Secretary of the Interior is authorized to prescribe appropriate regulations for the administration of this Act.

Indian Reorganization Act of June 18, 1934, as amended
25 U.S.C. § § 461-473

§ 461. On and after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

§ 462. The existing periods of trust placed upon any Indian lands and any restriction or alienation thereof are hereby extended and continued until otherwise directed by Congress.

§ 463. (a) The Secretary of the Interior, if he shall find it to be in the public interest, is authorized to restore tribal ownership the remaining surplus lands of any Indian reservation opened before June 18, 1934, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: * * * .

* * *

§ 464. Except as herein provided in sections [461 through 479] of this title, no sale, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: *Provided, however,* That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs or lineal descendants of such member or any other person for whom the Secretary of the Interior determines that the United States may hold trust * * * .

§ 465. The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians * * * .

Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

* * *

§ 467. The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by sections [461 through 479], or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

* * *

§ 470. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $10,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established. A report shall be made annually to Congress of transactions under this authorization.

* * *

§ 471. There is hereby authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed $250,000 annually, together with any unexpended balances of previous appropriations made pursuant to this section, for loans to Indians for the payment of tuition and other expenses in recognized vocational and trade schools: *Provided*, That not more than $50,000 of such sum

shall be available for loans to Indian students in high schools and colleges. Such loans shall be reimbursable under rules established by the Commissioner of Indian Affairs.

§ 472. The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

§ 473. The provisions of sections [461 through 479] of this title shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that sections 469, 470, 471, 472, and 476 of this title shall apply to the Territory of Alaska: * * *.

* * *

§ 473a. Sections 461, 465, 467, 468, 475, 477, and 479 of this title shall after May 1, 1936, apply to the Territory of Alaska: Provided, That groups of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 470, 476, and 477 of this title.

* * *

§ 476. Organization of Indian tribes; constitution and bylaws and amendment thereof; special election.

(a) Any tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when—(1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and (2) approved by the Secretary pursuant to subsection (d) of this section.

(b) Any constitution or bylaws ratified and approved by the Secretary shall be revocable by an election open to the same voters and conducted in the same manner as provided in subsection (a) of this section for the adoption of a constitution or bylaws.

(c) (1) The Secretary shall call and hold an election as required by subsection (a) of this section—(A) within one hundred and eighty days after the receipt of a tribal request for an election to ratify a proposed constitution and bylaws, or to revoke such constitution and bylaws; or (B) within ninety days after receipt of a tribal request for election to ratify an amendment to the constitution and bylaws.

(2) During the time periods established by paragraph (1), the Secretary shall—(A) provide such technical advice and assistance as may be requested by the tribe or as the Secretary determines may be needed; and (B) review the final draft of the constitution and bylaws, or amendments thereto to determine if any provision therein is contrary to applicable laws.

(3) After the review provided in paragraph (2) and at least thirty days prior to the calling of the election, the Secretary shall notify the tribe, in writing, whether and in what manner the Secretary has found the proposed constitution and bylaws or amendments thereto to be contrary to applicable laws.

(d) (1) If an election called under subsection (a) of this section results in the adoption by the tribe of the proposed constitution and bylaws or amendments thereto, the Secretary shall approve the constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution, and bylaws or any amendments are contrary to applicable laws.

(2) If the Secretary does not approve or disapprove the constitution and bylaws or amendments within the forty-five days, the Secretary's approval shall be considered as given. Actions to enforce the provisions of this section may be brought in the appropriate Federal district court.

(e) In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. The Secretary shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

(f) Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

(g) Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

§ 477. The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

* * *

§ 479. The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act,

Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

§ 496 (repealed 1976). That the Secretary of the Interior is hereby authorized to designate as an Indian reservation any area of land which has been reserved for the use and occupancy of Indians or Eskimos by section 8 of the Act of May 17, 1884 (23 Stat. 26); or by section 14 or section 15 of the Act of March 3, 1891 (26 Stat. 1101); or which has been heretofore reserved under any executive order and placed under the jurisdiction of the Department of the Interior or any bureau thereof, together with additional public lands adjacent thereto, within the Territory of Alaska, or any other public lands which are actually occupied by Indians or Eskimos within said Territory: *Provided*, That the designation by the Secretary of the Interior of any such area of land as a reservation shall be effective only upon its approval by the vote, by secret ballot, of a majority of the Indian or Eskimo residents thereof who vote at a special election duly called by the Secretary of the Interior upon thirty days' notice: *Provided, however*, That in each instance the total vote cast shall not be less than 30 per centum of those entitled to vote: *Provided further*, That nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, right-of-way, or other purpose whatsoever, or shall affect the rights of any such owner, claimant, locator, or entryman to the full use and enjoyment of the land so occupied.

Act of February 25, 1948
c.72, 62 Stat. 35

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the trustee or trustees to whom a patent has been issued for a townsite surveyed pursuant to section 11 of the Act of March 3, 1891 (26 Stat. 1095), or section 3 of the Act of May 25, 1926 (44 Stat. 629), upon a finding by the Secretary of the Interior or his authorized representative that any Alaska native who claims and occupies a tract of land within such townsite is competent to manage his own affairs and has petitioned the Secretary or his authorized representative for an unrestricted deed, or shall issue to such native an unrestricted deed, and thereafter all restrictions as to sale, encumbrance, or taxation of said lands shall be removed, but said land shall not be liable to the satisfaction of any debt, except obligations owed the Federal Government, contracted prior to the issuing of such deed.

Act of June 25, 1948, as amended
18 U.S.C. § 1151

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not

been extinguished, including rights-of-way running through the same.

Alaska Statehood Act
of July 7, 1958, as amended
72 Stat. 339

SEC. 4. As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any claims or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress may prescribe or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation: *Provided*, That nothing contained in this Act shall recognize, deny, enlarge, impair, or otherwise affect any claim against the United States, and any such claim shall be governed by the laws of the United State applicable thereto; and nothing in this Act is intended or shall be construed as a finding, interpretation, or construction by the Congress that any law applicable thereto authorizes, establishes, recognizes, or confirms the validity or invalidity of any such claim, and the

determination of the applicability or effect of any law to any such claim shall be unaffected by anything in this act. *And provided further*, That no taxes shall be imposed by said State upon any lands or other property now owned or hereafter acquired by the United States or which, as hereinabove set forth, may belong to said natives, except to such extent as the Congress may prescribe or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation.

Alaska Native Claims Settlement Act of 1971
as amended
Title 43
United States Code

§ 1601. Congressional findings and declaration of policy

Congress finds and declares that--

(a) there is an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims;

(b) the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska;

(c) no provision of this chapter shall replace or diminish any right, privilege, or obligation of Natives as citizens of the United States or of Alaska, or relieve, replace, or diminish any obligation of the United States or of the State or Alaska to protect and promote the rights or welfare of Natives as citizens of the United States or of Alaska; the Secretary is authorized and directed, together with other appropriate agencies of the United States Government, to make a study of all Federal programs primarily designed to benefit Native people and to report back to the Congress with his recommendations for the future management and operation of these programs within three years of December 18, 1971;

* * *

(g) no provision of this chapter shall be construed to terminate or otherwise curtail the activities of the Economic Development Administration or other Federal agencies conducting loan or loan and grant programs in Alaska. For this purpose only, the terms "Indian reservation" and "trust or restricted Indian-owned land areas" in Public Law 89-136, the Public Works and Economic Development Act of 1965, as amended [42 U.S.C. 3121 et seq.], shall be interpreted to include lands granted to Natives under this chapter as long as such lands remain in the ownership of the Native villages or the Regional Corporations.

* * *

§ 1602. Definitions

For the purposes of this chapter, the term--

* * *

(c) "Native village" means any tribe, band, clan, group, village, community, or association in Alaska listed in sections 1610 and 1615 of this title, or which meets the requirements of this chapter, and which the Secretary determines was, on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance), composed of twenty-five or more Natives;

* * *

(g) "Regional Corporation" means an Alaska Native Regional Corporation established under the laws of the State of Alaska in accordance with the provisions of this chapter;

* * *

(i) "Municipal Corporation" means any general unit of municipal government under the laws of the State of Alaska;

(j) "Village Corporation" means an Alaska Native Village Corporation organized under the laws of the State of Alaska as a business for profit or nonprofit corporation to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of a Native village in accordance with the terms of this chapter.

(k) "Fund" means the Alaska Native Fund in the Treasury of the United States established by section 1605 of this title;

* * *

(m) "Native Corporation" means any Regional Corporation, any Village Corporation, any Urban Corporation, and any Group Corporation;

(n) "Group Corporation" means an Alaska Native Group Corporation organized under the laws of the State of Alaska as a business for profit or nonprofit corporation to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of members of a Native group in accordance with the terms of this chapter;

(o) "Urban Corporation" means an Alaska Native Urban Corporation organized under the laws of the State of Alaska as a business for profit or nonprofit corporation to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of members of an urban community of Natives in accordance with the terms of this chapter;

(p) "Settlement Common Stock" means stock of a Native Corporation issued pursuant to section 1606(g)(1) of this title that carries with it the rights and restrictions listed in section 1606(h)(1) of this title;

(q) "Replacement Common Stock" means stock of a Native Corporation issued in exchange for Settlement Common Stock pursuant to section 1606(h)(3) of this title;

(r) "Descendant of a Native" means--

(1) a lineal descendant of a Native or of an individual who would have been a Native if such individual were alive on December 18, 1971, or

(2) an adoptee of a Native or of a descendant of a Native, whose adoption--

(A) occurred prior to his or her majority, and

(B) is recognized at law or in equity;

(s) "Alienability restrictions" means the restrictions imposed on Settlement Common Stock by section 1606(h)(1)(B) of this title;

(t) "Settlement Trust" means a trust--

(1) established and registered by a Native Corporation under the laws of the State of Alaska pursuant to a resolution

of its shareholders, and

(2) operated for the sole benefit of the holders of the corporation's Settlement Common Stock in accordance with section 1629e of this title and the laws of the State of Alaska.

§ 1603. Declaration of settlement

(a) Aboriginal title extinguishment through prior land and water area conveyances

All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.

(b) Aboriginal title and claim extinguishment where based on use and occupancy; submerged lands underneath inland and offshore water areas and hunting or fishing rights included

All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

(c) Aboriginal claim extinguishment where based on right, title, use, or occupancy of land or water areas; domestic statute or treaty relating to use and occupancy; or foreign laws; pending claims

All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use,

or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

* * *

§ 1605. Alaska Native Fund

(a) Establishment in Treasury; deposits into Fund of general fund, interest, and revenue sharing moneys

There is hereby established in the United States Treasury an Alaska Native Fund into which the following moneys shall be deposited:

(1) $462,500,000 from the general fund of the Treasury, which are authorized to be appropriated according to the following schedule:

* * *

(3) $500,000,000 pursuant to the revenue sharing provisions of section 1608 of this title.

* * *

(c) Distribution of Fund moneys among organized Regional Corporations; basis as relative number of Native enrollees in each region; reserve for payment of attorney and other fees; retention of share in Fund until organization of corporation

After completion of the roll prepared pursuant to section 1604 of this title, all money in the Fund, except money reserved as provided in section 1619 of this title for the payment of attorney and other fees, shall be distributed at the end of each three months of the fiscal year among the Regional Corporations organized pursuant to section 1606 of this title on the basis of the relative numbers of Natives enrolled in each region. The share of a Regional Corporation that has not been organized shall be retained in the Fund until the Regional Corporation is organized.

§ 1605 note

Pub.L. 96-487, Title XIV, § 1414, Dec. 2, 1980, 94 Stat. 2498, provided that:

"(a) Moneys appropriated for deposit in the Alaska Native Fund for the fiscal year following the enactment of this Act, [Dec. 2, 1980], shall, for the purposes of section 5 of Public Law 94-204 [set out as a note under this section] only, be deposited into the Alaska Native Fund on the first day of the fiscal year for which the moneys are appropriated, and shall be distributed at the end of the first quarter of the fiscal year in accordance with section 6(c) of the Alaska Native Claims Settlement Act [subsec. (c) of this section] notwithstanding any other provision of law.

"(b) For the fiscal year in which this Act is enacted [fiscal year 1981], the money appropriated shall be deposited within 10 days of enactment [Dec. 2, 1980], unless it has already been deposited in accordance with existing law, and shall be distributed no later than the end of the quarter following the quarter in which the money is deposited: *Provided*, That if the money is already deposited at the time of enactment of this Act, it must be distributed at the end of the quarter in which

this Act is enacted.

"(c) Notwithstanding section 38 of the Fiscal Year Adjustment Act [section 38 of Pub. L. 94-273, which amended this section] or any other provisions of law, interest earned from the investment of appropriations made pursuant to the Act of July 31, 1976 (Public Law 94-373; 90 Stat. 1051) [not classified to the Code], and deposited in the Alaska Native Fund on or after October 1, 1976, shall be deposited in the Alaska Native Fund within thirty days after enactment of this Act [Dec. 2, 1980] and shall be distributed as required by section 6(c) of the Alaska Native Claims Settlement Act [subsec. (c) of this section]."

Alaska Native Fund Viewed as Trust for Indian Tribes for Purposes of Interest and Investment

Pub.L. 94-204, § 5, Jan. 2, 1976, 89 Stat. 1147, provided that: "For purposes of the first section of the Act of February 12, 1929 (45 Stat. 1164), as amended [section 161a of Title 25, Indians], and the first section of the Act of June 24, 1938 (52 Stat. 1037) [section 162a of Title 25], the Alaska Native Fund shall, pending distributions under section 6(c) of the Settlement Act [subsec. (c) of this section], be considered to consist of funds held in trust by the Government of the United States for the benefit of Indian tribes: *Provided*, That nothing in this section shall be construed to create or terminate any trust relationship between the United States and any corporation or individual entitled to receive benefits under the Settlement Act [this chapter]."

§ 1606. Regional Corporations

(a) Division of Alaska into twelve geographic regions; common heritage and common interest of region; area of region commensurate with operations of Native association; boundary disputes, arbitration

For purposes of this chapter, the State of Alaska shall be divided by the Secretary within one year after December 18, 1971, into twelve geographic regions, with each region composed as far as practicable of Natives having a common heritage and sharing common interests. In the absence of good cause shown to the contrary, such regions shall approximate the areas covered by the operations of the following existing Native associations:

(1) Arctic Slope Native Association (Barrow, Point Hope);

(2) Bering Straits Association (Seward Peninsula, Unalakleet, Saint Lawrence Island);

(3) Northwest Alaska Native Association (Kotzebue);

(4) Association of Village Council Presidents (southwest coast, all villages in the Bethel area, including all villages on the Lower Yukon River and the Lower Kuskokwim River);

(5) Tanana Chiefs' Conference (Koyukuk, Middle and Upper Yukon Rivers, Upper Kuskokwim, Tanana River);

(6) Cook Inlet Association (Kenai, Tyonek, Eklutna, Iliamna);

(7) Bristol Bay Native Association (Dillingham, Upper Alaska Peninsula);

(8) Aleut League (Aleutian Islands, Pribilof Islands and that part of the Alaska Peninsula which is in the Aleut League);

(9) Chugach Native Association (Cordova, Tatitlek, Port Graham, English Bay, Valdez, and Seward);

(10) Tlingit-Haida Central Council (southeastern Alaska, including Metlakatla);

(11) Kodiak Area Native Association (all villages on and around Kodiak Island); and

(12) Copper River Native Association (Copper Center, Glennallen, Chitina, Mentasta).

Any dispute over the boundaries of a region or regions shall be resolved by a board of arbitrators consisting of one person selected by each of the Native associations involved, and an additional one or two persons, whichever is needed to make an odd number of arbitrators, such additional person or persons to be selected by the arbitrators selected by the Native associations involved.

(b) Region mergers; limitation

The Secretary may, on request made within one year of December 18, 1971, by representative and responsible leaders of the Native associations listed in subsection (a) of this section, merge two or more of the twelve regions: *Provided*, That the twelve regions may not be reduced to less than seven, and there may be no fewer than seven Regional Corporations.

* * *

(d) Incorporation; business for profit; eligibility for benefits; provisions in articles for carrying out chapter

Five incorporators within each region, named by the Native association in the region, shall incorporate under the laws of Alaska a Regional Corporation to conduct business for profit, which shall be eligible for the benefits of this chapter so long as it is organized and functions in accordance with this chapter. The articles of incorporation shall include provisions necessary to carry out the terms of this chapter.

(e) Original articles and bylaws: approval by Secretary prior to filing, submission for approval; amendments to articles: approval by Secretary; withholding approval in event of creation of inequities among Native individuals or groups

The original articles of incorporation and bylaws shall be approved by the Secretary before they are filed, and they shall be submitted for approval within eighteen months after December 18, 1971. The articles of incorporation may not be amended during the Regional Corporation's first five years without the approval of the Secretary. The Secretary may withhold approval under this section if in his judgment inequities among Native individuals or groups of Native individuals would be created.

(f) Board of directors; management; stockholders; provisions in articles or bylaws for number, term and method of election

The management of the Regional Corporation shall be vested in a board of directors, all of whom, with the exception of the initial board, shall be stockholders over the age of eighteen. The number, terms, and method of election of members of the board of directors shall be fixed in the articles of incorporation or bylaws of the Regional Corporation.

(g) Issuance of stock

(1) Settlement Common Stock

(A) The Regional Corporation shall be authorized to issue such number of shares of Settlement Common Stock (divided into such classes as may be specified in the articles of incorporation to reflect the provisions of this chapter) as may be needed to issue one hundred shares of stock to each Native enrolled in the region pursuant to section 1604 of this title.

(B)(i) A Regional Corporation may amend its articles of incorporation to authorize the issuance of additional shares of Settlement Common Stock to--

(I) Natives born after December 18, 1971, and, at the further option of the Corporation, descendants of Natives born after December 18, 1971,

(II) Natives who were eligible for enrollment pursuant to section 1604 of this title but were not so enrolled, or

(III) Natives who have attained the age of 65, for no consideration or for such consideration and upon such terms and conditions as may be specified in such amendment or in a resolution approved by the board of directors pursuant to authority expressly vested in the board by the amendment. The amendment to the articles of incorporation may specify which class of Settlement Common Stock shall be issued to the various groups of Natives.

(ii) Not more than one hundred shares of Settlement Common Stock shall be issued to any one individual pursuant to clause (i).

(iii) The amendment authorized by clause (i) may provide that Settlement Common Stock issued to a Native pursuant to such amendment (or stock issued in exchange for such Settlement Common Stock pursuant to subsection (h)(3) of this section or section 1629c(d) of this title) shall be deemed canceled upon the death of such Native. No compensation for this cancellation shall be paid to the estate of the deceased Native or to any person holding the stock.

(iv) Settlement Common Stock issued pursuant to clause (i) shall not carry rights to share in distributions made to shareholders pursuant to subsections (j) and (m) of this section unless, prior to the issuance of such stock, a majority of the class of existing holders of Settlement Common Stock carrying such rights separately approve the granting of such rights. The articles of incorporation of the Regional Corporation shall be

deemed to be amended to authorize such class vote.

(C)(i) A Regional Corporation may amend its articles of incorporation to authorize the issuance of additional shares of Settlement Common Stock as a dividend or other distribution (without regard to surplus of the corporation under the laws of the State) upon each outstanding share of Settlement Common Stock issued pursuant to subparagraphs (A) and (B).

(ii) The amendment authorized by clause (i) may provide that shares of Settlement Common Stock issued as a dividend or other distribution shall constitute a separate class of stock with greater per share voting power than Settlement Common Stock issued pursuant to subparagraphs (A) and (B).

* * *

(h) Settlement Common Stock

(1) Rights and restrictions

(A) Except as otherwise expressly provided in this chapter, Settlement Common Stock of a Regional Corporation shall--

(i) carry a right to vote in elections for the board of directors and on such other questions as properly may be presented to shareholders;

(ii) permit the holder to receive dividends or other distributions from the corporation; and

(iii) vest in the holder all rights of a shareholder in a business corporation organized under the laws of the State.

(B) Except as otherwise provided in this subsection, Settlement Common Stock, inchoate rights thereto, and rights to dividends or distributions declared with respect thereto shall not be--

(i) sold;

(ii) pledged;
(iii) subjected to a lien or judgment execution;
(iv) assigned in present or future;
(v) treated as an asset under--
(I) Title 11 or any successor statute,
(II) any other insolvency or moratorium law, or
(III) other laws generally affecting creditors' rights;
or
(vi) otherwise alienated.

(C) Notwithstanding the restrictions set forth in subparagraph (B), Settlement Common Stock may be transferred to a Native or a descendant of a Native--

(i) pursuant to a court decree of separation, divorce, or child support;

(ii) by a holder who is a member of a professional organization, association, or board that limits his or her ability to practice his or her profession because he or she holds Settlement Common Stock; or

(iii) as an inter vivos gift from a holder to his or her child, grandchild, great-grandchild, niece, nephew, or (if the holder has reached the age of majority as defined by the laws of the State of Alaska) brother or sister.

(2) Inheritance of Settlement Common Stock

(A) Upon the death of a holder of Settlement Common Stock, ownership of such stock (unless canceled in accordance with subsection (g)(1)(B)(iii) of this section) shall be transferred in accordance with the lawful will of such holder or pursuant to applicable laws of intestate succession. If the holder fails to dispose of his or her stock by will and has no heirs under applicable laws of intestate succession, the stock shall escheat to the issuing Regional Corporation and be canceled.

(B) The issuing Regional Corporation shall have the right to purchase at fair value Settlement Common Stock transferred pursuant to applicable laws of intestate succession to a person not a Native or a descendant of a Native after February 3, 1988, if--

(i) the corporation--

(I) amends its articles of incorporation to authorize such purchases, and

(II) gives the person receiving such stock written notice of its intent to purchase within ninety days after the date that the corporation either determines the decedent's heirs in accordance with the laws of the State or receives notice that such heirs have been determined, whichever later occurs; and

(ii) the person receiving such stock fails to transfer the stock pursuant to paragraph (1)(C)(iii) within sixty days after receiving such written notice.

(C) Settlement Common Stock of a Regional Corporation--

(i) transferred by will or pursuant to applicable laws of intestate succession after February 3, 1988, or

(ii) transferred by any means prior to February 3, 1988,

to a person not a Native or a descendant of a Native shall not carry voting rights. If at a later date such stock is lawfully transferred to a Native or a descendant of a Native, voting rights shall be automatically restored.

(3) Replacement Common Stock

(A) On the date on which alienability restrictions terminate in accordance with the provisions of section 1629c of this title, all Settlement Common Stock previously issued by a Regional Corporation shall be deemed canceled, and shares of Replacement Common Stock of the appropriate class shall be issued to each shareholder, share for share, subject only to

subparagraph (B) and to such restrictions consistent with this chapter as may be provided by the articles of incorporation of the corporation or in agreements between the corporation and individual shareholders.

(B)(i) Replacement Common Stock issued in exchange for Settlement Common Stock issued subject to the restriction authorized by subsection (g)(1)(B)(iii) of this section shall bear a legend indicating that the stock will eventually be canceled in accordance with the requirements of that subsection.

(ii) Prior to the termination of alienability restrictions, the board of directors of the corporation shall approve a resolution to provide that each share of Settlement Common Stock carrying the right to share in distributions made to shareholders pursuant to subsections (j) and (m) of this section shall be exchanged either for--

(I) a share of Replacement Common Stock that carries such right, or

(II) a share of Replacement Common Stock that does not carry such right together with a separate, non-voting security that represents only such right.

(iii) Replacement Common Stock issued in exchange for a class of Settlement Common Stock carrying greater per share voting power than Settlement Common Stock issued pursuant to subsections (g)(1)(A) and (g)(1)(B) of this section shall carry such voting power and be subject to such other terms as may be provided in the amendment to the articles of incorporation authorizing the issuance of such class of Settlement Common Stock.

(C) The articles of incorporation of the Regional Corporation shall be deemed amended to authorize the issuance of Replacement Common Stock and the security described in subparagraph (B)(ii)(II).

(D) Prior to the date on which alienability restrictions terminate, a Regional Corporation may amend its articles of

incorporation to impose upon Replacement Common Stock one or more of the following--

(i) a restriction denying voting rights to any holder of Replacement Common Stock who is not a Native or a descendant of a Native;

(ii) a restriction granting the Regional Corporation, or the Regional Corporation and members of the shareholder's immediate family who are Natives or descendants of Natives, the first right to purchase, on reasonable terms, the Replacement Common Stock of the shareholder prior to the sale or transfer of such stock (other than a transfer by will or intestate succession) to any other party, including a transfer in satisfaction of a lien, writ of attachment, judgment execution, pledge, or other encumbrance; and

(iii) any other term, restriction, limitation, or provision authorized by the laws of the State.

(E) Replacement Common Stock shall not be subjected to a lien or judgment execution based upon any asserted or unasserted legal obligation of the original recipient arising prior to the issuance of such stock.

* * *

(i) Certain natural resource revenues; distribution among twelve Regional Corporations; computation of amount; subsection inapplicable to thirteenth Regional Corporation

Seventy per centum of all revenues received by each Regional Corporation from the timber resources and subsurface estate patented to it pursuant to this chapter shall be divided annually by the Regional Corporation among all twelve Regional Corporations organized pursuant to this section according to the number of Natives enrolled in each region

pursuant to section 1604 of this title. The provisions of this subsection shall not apply to the thirteenth Regional Corporation if organized pursuant to subsection (c) hereof.

(2) For purposes of this subsection, the term "revenues" does not include any benefit received or realized for the use of losses incurred or credits earned by a Regional Corporation.

(j) Corporate funds and other net income, distribution among: stockholders of Regional Corporations; Village Corporations and nonresident stockholders; and stockholders of thirteenth Regional Corporation

During the five years following December 18, 1971, not less than 10% of all corporate funds received by each of the twelve Regional Corporations under section 1605 of this title (Alaska Native Fund), and under subsection (i) of this section (revenues from the timber resources and subsurface estate patented to it pursuant to this chapter), and all other net income, shall be distributed among the stockholders of the twelve Regional Corporations. Not less than 45% of funds from such sources during the first five-year period, and 50% thereafter, shall be distributed among the Village Corporations in the region and the class of stockholders who are not residents of those villages, as provided in subsection to it. In the case of the thirteenth Regional Corporation, if organized, not less than 50% of all corporate funds received under section 1605 of this title shall be distributed to the stockholders.

(k) Distributions among Village Corporations; computation of amount

Funds distributed among the Village Corporations shall be divided among them according to the ratio that the number of shares of stock registered on the books of the Regional

Corporation in the names of residents of each village bears to the number of shares of stock registered in the names of residents in all villages.

(l) Distributions to Village Corporations; village plan: withholding funds until submission of plan for use of money; joint ventures and joint financing of projects; disagreements, arbitration of issues as provided in articles of Regional Corporation

Funds distributed to a Village Corporation may be withheld until the village has submitted a plan for the use of the money that is satisfactory to the Regional Corporation. The Regional Corporation may require a village plan to provide for joint ventures with other villages, and for joint financing of projects undertaken by the Regional Corporation that will benefit the region generally. In the event of disagreement over the provisions of the plan, the issues in disagreement shall be submitted to arbitration, as shall be provided for in the articles of incorporation of the Regional Corporation.

(m) Distributions among Village Corporations in a region; computation of dividends for nonresidents of village; financing regional projects with equitably withheld dividends and Village Corporation funds

When funds are distributed among Village Corporations in a region, an amount computed as follows shall be distributed as dividends to the class of stockholders who are not residents of those villages: The amount distributed as dividends shall bear the same ratio to the amount distributed among the Village Corporations that the number of shares of stock registered on the books of the Regional Corporation in the names of nonresidents of villages bears to the number of shares of stock

registered in the names of village residents: *Provided*, That an equitable portion of the amount distributed as dividends may be withheld and combined with Village Corporation funds to finance projects that will benefit the region generally.

* * *

(o) Annual audit; place; availability of papers, things, or property to auditors to facilitate audits; verification of transactions; report to stockholders

The accounts of the Regional Corporation shall be audited annually in accordance with generally accepted auditing standards by independent certified public accountants or independent licensed public accountants, certified, or licensed by a regulatory authority of the State or the United States. The audits shall be conducted at the place or places where the accounts of the Regional Corporation are normally kept. All books, accounts, financial records, reports, files, and other papers, things, or property belonging to or in use by the Regional Corporation and necessary to facilitate the audits shall be available to the person or persons conducting the audits; and full facilities for verifying transactions with the balances or securities held by depositories, fiscal agent, and custodians shall be afforded to such person or persons. Each audit report or a fair and reasonably detailed summary thereof shall be transmitted to each stockholder.

(p) Federal-State conflict of laws

In the event of any conflict between the provisions of this section and the laws of the State of Alaska, the provisions of this section shall prevail.

* * * *

§ 1607. Village Corporations

(a) Organization of Corporation prerequisite to receipt of patent to lands or benefits under chapter

The Native residents of each Native village entitled to receive lands and benefits under this chapter shall organize as a business for profit or nonprofit corporation under the laws of the State before the Native village may receive patent to lands or benefits under this chapter, except as otherwise provided.

(b) Regional Corporation: approval of initial articles; review and approval of amendments to articles and annual budgets; assistance in preparation of articles and other documents

The initial articles of incorporation for each Village Corporation shall be subject to the approval of the Regional Corporation for the region in which the village is located. Amendments to the articles of incorporation and the annual budgets of the Village Corporations shall, for a period of five years, be subject to review and approval by the Regional Corporation. The Regional Corporation shall assist and advise Native villages in the preparation of articles of incorporation and other documents necessary to meet the requirements of this subsection.

(c) Applicability of section 1606

The provisions of subsections (g), (h) (other than paragraph (4)), and (o) of section 1606 of this title shall apply in all respects to Village Corporations, Urban Corporations, and

Group Corporations.

§ 1608. Revenue sharing

* * *

(b) Interim payments into Alaska Native Fund based on percentage of gross value of produced or removed minerals and of rentals and bonuses; time of payment

With respect to conditional leases and sales of minerals heretofore or hereafter made pursuant to section 6(g) of the Alaska Statehood Act, and with respect to mineral leases of the United States that are or may be subsumed by the State under section 6(h) of the Alaska Statehood Act, until such time as the provisions of subsection (c) of this section become operative the State shall pay into the Alaska Native Fund from the royalties, rentals, and bonuses hereafter received by the State (1) a royalty of 2 per centum upon the gross value (as such gross value is determined for royalty purposes under such leases or sales) of such minerals produced or removed from such lands, and (2) 2 per centum of all rentals and bonuses under such leases or sales, excluding bonuses received by the State at the September 1969 sale of minerals from tentatively approved lands and excluding rentals received pursuant to such sale before December 18, 1971. Such payment shall be made within sixty days from the date the revenues are received by the State.

(c) Patents; royalties: reservation of percentage of gross value of produced or removed minerals and rentals and bonuses from disposition of minerals

Each patent hereafter issued to the State under the Alaska

Statehood Act, including a patent of lands heretofore selected and tentatively approved, shall reserve for the benefit of the Natives, and for payment into the Alaska Native Fund, (1) a royalty of 2 per centum upon the gross value (as such gross value is determined for royalty purposes under any disposition by the State) of the minerals thereafter produced or removed from such lands, and (2) 2 per centum of all revenues thereafter derived by the State from rentals and bonuses from the disposition of such minerals.

(d) Distribution of bonuses, rentals, and royalties from Federal disposition of minerals in public lands; payments into Alaska Native Fund based on percentage of gross value of produced minerals and of rentals and bonuses; Federal and State share calculation on remaining balance

All bonuses, rentals, and royalties received by the United States after December 18, 1971, from the disposition by it of such minerals in public lands in Alaska shall be distributed as provided in the Alaska Statehood Act, except that prior to calculating the shares of the State and the United States as set forth in such Act, (1) a royalty of 2 per centum upon the gross value of such minerals produced (as such gross value is determined for royalty purposes under the sale or lease), and (2) 2 per centum of all rentals and bonuses shall be deducted and paid into the Alaska Native Fund. The respective shares of the State and the United States shall be calculated on the remaining balance.

(e) Federal enforcement; State underpayment: deductions from grants in aid or other Federal assistance equal to underpayment and deposit of such amount in Fund

The provisions of this section shall be enforceable by the United States for the benefit of the Natives, and in the event of default by the State in making the payments required, in addition to any other remedies provided by law, there shall be deducted annually by the Secretary of the Treasury from any grant-in-aid or from any other sums payable to the State under any provision of Federal law an amount equal to any such underpayment, which amount shall be deposited in the Fund.

* * *

§ 1610. Withdrawal of public lands

(a) Description of withdrawn public lands; exceptions; National Wildlife Refuge lands exception; time of withdrawal

(1) The following public lands are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from selection under the Alaska Statehood Act, as amended:

(A) The lands in each township that encloses all or part of any Native village identified pursuant to subsection (b) of this section;

(B) The lands in each township that is contiguous to or corners on the township that encloses all or part of such Native village; and

(C) The lands in each township that is contiguous to or corners on a township containing lands withdrawn by paragraph (B) of this subsection.

The following lands are excepted from such withdrawal: lands in the National Park System and lands withdrawn or reserved

for national defense purposes other than Naval Petroleum Reserve Numbered 4.

(2) All lands located within the townships described in subsection (a)(1) hereof that have been selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from the creation of third party interests by the State under the Alaska Statehood Act.

(3)(A) If the Secretary determines that the lands withdrawn by subsections (a)(1) and (2) hereof are insufficient to permit a Village or Regional Corporation to select the acreage it is entitled to select, the Secretary shall withdraw three times the deficiency from the nearest unreserved, vacant and unappropriated public lands. In making this withdrawal the Secretary shall, insofar as possible, withdraw public lands of a character similar to those on which the village is located and in order of their proximity to the center of the Native village: *Provided*, That if the Secretary, pursuant to section 1616, and 1621(e) of this title determines there is a need to expand the boundaries of a National Wildlife Refuge to replace any acreage selected in the Wildlife Refuge System by the Village Corporation the withdrawal under this section shall not include lands in the Refuge.

(B) The Secretary shall make the withdrawal provided for in subsection (3)(A) hereof on the basis of the best available information within sixty days of December 18, 1971, or as soon thereafter as practicable.

(b) List of Native Villages subject to chapter; review; eligibility for benefits; expiration of withdrawals for villages; alternative eligibility; eligibility of unlisted villages

(1) The Native villages subject to this chapter are as follows:

NAME OF PLACE AND REGION

Afognak, Afognak Island.
Akhiok, Kodiak.
Akiachak, Southwest Coastal Lowland.
Akiak, Southwest Coastal Lowland.
Akutan, Aleutian.
Alakanuk, Southwest Coastal Lowland.
Alatna, Koyukuk-Lower Yukon.
Aleknagik, Bristol Bay.
Allakaket, Koyukuk-Lower Yukon.
Ambler, Bering Strait.
Anaktuvuk, Pass, Arctic Slope.
Andreafsey, Southwest Coastal Lowland.
Aniak, Southwest Coastal Lowland.
Anvik, Koyukuk-Lower Yukon.
Arctic Village, Upper Yukon-Porcupine.
Atka, Aleutian.
Atkasook, Arctic Slope.
Atmautluak, Southwest Coastal Lowland.
Barrow, Arctic Slope.
Beaver, Upper Yukon-Porcupine.
Belkofsky, Aleutian.
Bethel, Southwest Coastal Lowland.
Bill Moore's, Southwest Coastal Lowland.
Biorka, Aleutian.
Birch Creek, Upper Yukon-Porcupine.
Brevig Mission, Bering Strait.
Buckland, Bering Strait.
Candle, Bering Strait.
Cantwell, Tanana.
Canyon Village, Upper Yukon-Porcupine.

Chalkyitsik, Upper Yukon-Porcupine.
Chanilut, Southwest Coastal Lowland.
Cherfornak, Southwest Coastal Lowland.
Chevak, Southwest Coastal Lowland.
Chignik, Kodiak.
Chignik Lagoon, Kodiak.
Chignik Lake, Kodiak.
Chistochina, Copper River.
Chitina, Copper River.
Chukwuktoligamute, Southwest Coastal Lowland.
Circle, Upper Yukon-Porcupine.
Clark's Point, Bristol Bay.
Copper Center, Copper River.
Crooked Creek, Upper Kuskokwim.
Deering, Bering Strait.
Dillingham, Bristol Bay.
Dot Lake, Tanana.
Eagle, Upper Yukon-Porcupine.
Eek, Southwest Coastal Lowland.
Egegik, Bristol Bay.
Eklutna, Cook Inlet.
Ekuk, Bristol Bay.
Ekwok, Bristol Bay.
Elim, Bering Strait.
Emmonak, Southwest Coastal Lowland.
English Bay, Cook Inlet.
False Pass, Aleutian.
Fort Yukon, Upper Yukon-Porcupine.
Gakona, Copper River.
Galena, Koyukuk-Lower Yukon.
Gambell, Bering Sea.
Georgetown, Upper Kuskokwim.
Golovin, Bering Strait.
Goodnews Bay, Southwest Coastal Lowland.

Grayling, Koyukuk-Lower Yukon.
Gulkana, Copper River.
Hamilton, Southwest Coastal Lowland.
Holy Cross, Koyukuk-Lower Yukon.
Hooper Bay, Southwest Coastal Lowland.
Hughes, Koyukuk-Lower Yukon.
Huslia, Koyukuk-Lower Yukon.
Igiugig, Bristol Bay.
Iliamna, Cook Inlet.
Inalik, Bering Strait.
Ivanof Bay, Aleutian.
Kaguyak, Kodiak.
Kaktovik, Arctic Slope.
Kalskag, Southwest Coastal Lowland.
Kaltag, Koyukuk-Lower Yukon.
Karluk, Kodiak.
Kasigluk, Southwest Coastal Lowland.
Kiana, Bering Strait.
King Cove, Aleutian.
Kipnuk, Southeast Coastal Lowland.
Kivalina, Bering Strait.
Kobuk, Bering Strait.
Kokhanok, Bristol Bay.
Koliganek, Bristol Bay.
Kongiganak, Southwest Coastal Lowland.
Kotlik, Southwest Coastal Lowland.
Kotzebue, Bering Strait.
Koyuk, Bering Strait.
Koyukuk, Koyukuk-Lower Yukon.
Kwethluk, Southwest Coastal Lowland.
Kwigillingok, Southwest Coastal Lowland.
Larsen Bay, Kodiak.
Levelock, Bristol Bay.
Lime Village, Upper Kuskokwim.

Lower Kalskag, Southwest Coastal Lowland.
McGrath, Upper Kuskokwim.
Makok, Koyukuk-Lower Yukon.
Manley Hot Springs, Tanana.
Manokotak, Bristol Bay.
Marshall, Southwest Coastal Lowland.
Mary's Igloo, Bering Strait.
Medfra, Upper Kuskokwim.
Mekoryuk, Southwest Coastal Lowland.
Mentasta Lake, Copper River.
Minchumina Lake, Upper Kuskokwim.
Minto, Tanana.
Mountain Village, Southwest Coastal Lowland.
Nabesna Village, Tanana.
Naknek, Bristol Bay.
Napaimute, Upper Kuskokwim.
Napakiak, Southwest Coastal Lowland.
Napaskiak, Southwest Coastal Lowland.
Nelson Lagoon, Aleutian.
Nenana, Tanana.
Newhalen, Cook Inlet.
New Stuyahok, Bristol Bay.
Newtok, Southwest Coastal Lowland.
Nightmute, Southwest Coastal Lowland.
Nikolai, Upper Kuskokwim.
Nikolski, Aleutian.
Ninilchik, Cook Inlet.
Noatak, Bering Strait.
Nome, Bering Strait.
Nondalton, Cook Inlet.
Nooiksut, Arctic Slope.
Noorvik, Bering Strait.
Northeast Cape, Bering Sea.
Northway, Tanana.

Nulato, Koyukuk-Lower Yukon.
Nunapitchuk, Southwest Coastal Lowland.
Ohogamiut, Southwest Coastal Lowland.
Old Harbor, Kodiak.
Oscarville, Southwest Coastal Lowland.
Ouzinkie, Kodiak.
Paradise, Koyukuk-Lower Yukon.
Pauloff Harbor, Aleutian.
Pedro Bay, Cook Inlet.
Perryville, Kodiak.
Pilot Point, Bristol Bay.
Pilot Station, Southwest Coastal Lowland.
Pitkas Point, Southwest Coastal Lowland.
Platinum, Southwest Coastal Lowland.
Point Hope, Artic Slope.
Point Lay, Arctic Slope.
Portage Creek (Ohgsenakale), Bristol Bay.
Port Graham, Cook Inlet.
Port Heiden (Meshick), Aleutian.
Port Lions, Kodiak.
Quinhagak, Southwest Coastal Lowland.
Rampart, Upper Yukon-Porcupine.
Red Devil, Upper Kuskokwim.
Ruby, Koyukuk-Lower Yukon.
Russian Mission or Chauthalue (Kuskokwim), Upper Kuskokwim.
Russian Mission (Yukon), Southwest Coastal Lowland.
St. George, Aleutian.
St. Mary's, Southwest Coastal Lowland.
St. Michael, Bering Strait.
St. Paul, Aleutian.
Salamatof, Cook Inlet.
Sand Point, Aleutian.
Savonoski, Bristol Bay.

Savoonga, Bering Sea.
Scammon Bay, Southwest Coastal Lowland.
Selawik, Bering Strait.
Seldovia, Cook Inlet.
Shageluk, Koyukuk-Lower Yukon.
Shaktoolik, Bering Strait.
Sheldon's Point, Southwest Coastal Lowland.
Shishmaref, Bering Strait.
Shungnak, Bering Strait.
Slana, Copper River.
Sleetmute, Upper Kuskokwim.
South Naknek, Bristol Bay.
Squaw Harbor, Aleutian.
Stebbins, Bering Strait.
Stevens Village, Upper Yukon-Porcupine.
Stony River, Upper Kuskokwim.
Takotna, Upper Kuskokwim.
Tanacross, Tanana.
Tanana, Koyukuk-Lower Yukon.
Tatilek, Chugach.
Tazlina, Copper River.
Telida, Upper Kuskokwim.
Teller, Bering Strait.
Tetlin, Tanana.
Togiak, Bristol Bay.
Toksook Bay, Southwest Coastal Lowland.
Tulusak, Southwest Coastal Lowland.
Tuntutuliak, Southwest Coastal Lowland.
Tununak, Southwest Coastal Lowland.
Twin Hills, Bristol Bay.
Tyonek, Cook Inlet.
Ugashik, Bristol Bay.
Unalakleet, Bering Strait.
Unalaska, Aleutian.

Unga, Aleutian.
Uyak, Kodiak.
Venetie, Upper Yukon-Porcupine.
Wainwright, Arctic Slope.
Wales, Bering Strait.
White Mountain, Bering Strait.

(2) Within two and one-half years from December 18, 1971, the Secretary shall review all of the villages listed in subsection (b)(1) hereof, and a village shall not be eligible for land benefits under section 1613(a) and (b) of this title, and any withdrawal for such village shall expire, if the Secretary determines that--

(A) less than twenty-five Natives were residents of the village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; or,

(B) the village is of a modern and urban character, and the majority of the residents are non-Native.

Any Native group made ineligible by this subsection shall be considered under section 1613(h) of this title.

(3) Native villages not listed in subsection (b)(1) hereof shall be eligible for land and benefits under this chapter and lands shall be withdrawn pursuant to this section if the Secretary within two and one-half years from December 18, 1971, determines that--

(A) twenty-five or more Natives were residents of an established village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; and

(B) the village is not of a modern and urban character, and a majority of the residents are Natives.

§ 1611. Native land selections

(a) Acreage limitation; proximity of selections and size of sections and units; waiver

(1) During a period of three years from December 18, 1971, the Village Corporation for each Native village identified pursuant to section 1610 of this title shall select, in accordance with rules established by the Secretary, all of the township or townships in which any part of the village is located, plus an area that will make the total selection equal to the acreage to which the village is entitled under section 1613 of this title. The selection shall be made from lands withdrawn by section 1610(a) of this title: *Provided*, That no Village Corporation may select more than 69,120 acres from lands withdrawn by section 1610(a)(2) of this title, and not more than 69,120 acres from the National Wildlife Refuge System, and not more than 69,120 acres in a National Forest: *Provided further*, That when a Village Corporation selects the surface estate to lands within the National Wildlife Refuge System or Naval Petroleum Reserve Numbered 4, the Regional Corporation for that region may select the subsurface estate in an equal acreage from other lands withdrawn by section 1610(a) of this title within the region, if possible.

(2) Selections made under this subsection (a) of this section shall be contiguous and in reasonably compact tracts, except as separated by bodies of water or by lands which are unavailable for selection, and shall be in whole sections and, wherever feasible, in units of not less than 1,280 acres. *Provided*, That the Secretary in his discretion and upon the request of the concerned Village Corporation, may waive the whole section requirement where--

(A)(i) a portion of available public lands of a section is separated from other available public lands in the same section

by lands unavailable for selection or by a meanderable body of water;

(ii) such waiver will not result in small isolated parcels of available public land remaining after conveyance of selected lands to Native Corporations; and

(iii) such waiver would result in a better land ownership pattern or improved land or resource management opportunity; or

(B) the remaining available public lands in the section have been selected and will be conveyed to another Native Corporation under this chapter.

(b) Allocation; reallocation considerations

The difference between twenty-two million acres and the total acreage selected by Village Corporations pursuant to subsection (a) of this section shall be allocated by the Secretary among the eleven Regional Corporations (which excludes the Regional Corporation for southeastern Alaska) on the basis of the number of Natives enrolled in each region. Each Regional Corporation shall reallocate such acreage among the Native villages within the region on an equitable basis after considering historic use, subsistence needs, and population. The action of the Secretary or the Corporation shall not be subject to judicial review. Each Village Corporation shall select the acreage allocated to it from the lands withdrawn by section 1610(a) of this title.

(c) Computation

The difference between thirty-eight million acres and the 22 million acres selected by Village Corporations pursuant to subsections (a) and (b) of this section shall be allocated among the eleven Regional Corporations (which excludes the Regional

Corporation for southeastern Alaska) as follows:

(1) The number of acres each Regional Corporation is entitled to receive shall be computed (A) by determining on the basis of available data the percentage of all land in Alaska (excluding the southeastern region) that is within each of the eleven regions, (B) by applying that percentage to thirty-eight million acres reduced by the acreage in the southeastern region that is to be selected pursuant to section 1615 of this title, and (C) by deducting from the figure so computed the number of acres within that region selected pursuant to subsections (a) and (b) of this section.

* * *

§ 1613. Conveyance of lands

(a) Native villages listed in section 1610 and qualified for land benefits; patents for surface estates; issuance; acreage

Immediately after selection by a Village Corporation for a Native village listed in section 1610 of this title which the Secretary finds is qualified for land benefits under this chapter, the Secretary shall issue to the Village Corporation a patent to the surface estate in the number of acres shown in the following table:

If the village had on the 1970 census enumeration date a Native population between--	It shall be entitled to a patent to an area of public lands equal to--
25 and 99	69,120 acres.
100 and 199	92,160 acres.
200 and 399	115,200 acres.
400 and 599	138,240 acres.

600 or more ..... 161,280 acres.

The lands patented shall be those selected by the Village Corporation pursuant to section 1611(a) of this title. In addition, the Secretary shall issue to the Village Corporation a patent to the surface estate in the lands selected pursuant to section 1611(b) of this title.

(b) Native villages listed in section 1615 and qualified for land benefits; patents for surface estates; issuance; acreage

Immediately after selection by any Village Corporation for a Native village listed in section 1615 of this title which the Secretary finds is qualified for land benefits under this chapter, the Secretary shall issue to the Village Corporation a patent to the surface estate to 23,040 acres. The lands patented shall be the lands within the township or townships that enclose the Native village, and any additional lands selected by the Village Corporation from the surrounding townships withdrawn for the Native village by section 1615(a) of this title.

(c) Patent requirements; order of conveyance; vesting date; advisory and appellate functions of Regional Corporations on sales, leases, or other transactions prior to final commitment

Each patent issued pursuant to subsections (a) and (b) of this section shall be subject to the requirements of this subsection. Upon receipt of a patent or patents:

(1) the Village Corporation shall first convey to any Native or non-Native occupant, without consideration, title to the surface estate in the tract occupied as of December 18, 1971 (except that occupancy of tracts located in the

Pribilof Islands shall be determined as of the date of initial conveyance of such tracts to the appropriate Village Corporation) as a primary place of residence, or as a primary place of business, or as a subsistence campsite, or as headquarters for reindeer husbandry;

(2) the Village Corporation shall then convey to the occupant, either without consideration or upon payment of an amount not in excess of fair market value, determined as of the date of initial occupancy and without regard to any improvements thereon, title to the surface estate in any tract occupied as of December 18, 1971, by a nonprofit organization;

(3) the Village Corporation shall then convey to any Municipal Corporation in the Native village or to the State in trust for any Municipal Corporation established in the Native village in the future, title to the remaining surface estate of the improved land on which the Native village is located and as much additional land as is necessary for community expansion, and appropriate rights-of-way for public use, and other foreseeable community needs: Provided, That the amount of lands to be transferred to the Municipal Corporation or in trust shall be no less than 1,280 acres unless the Village Corporation and the Municipal Corporation or the State in trust can agree in writing on an amount which is less than one thousand two hundred and eighty acres: Provided further, That any net revenues derived from the sale of surface resources harvested or extracted from lands reconveyed pursuant to this subsection shall be paid to the Village Corporation by the Municipal Corporation or the State in trust: Provided, however, That the word "sale", as used in the preceding sentence, shall not include the utilization of surface resources for governmental purposes by the Municipal Corporation or the State in trust, nor shall it include the issuance of free use permits or other

authorization for such purposes;

(4) the Village Corporation shall convey to the Federal Government, State, or to the appropriate Municipal Corporation, title to the surface estate for airport sites, airway beacons, and other navigation aids as such existed on December 18, 1971, together with such additional acreage and/or easements as are necessary to provide related governmental services and to insure safe approaches to airport runways as such airport sites, runways, and other facilities existed as of December 18, 1971; and

(5) for a period of ten years after December 18, 1971, the Regional Corporation shall be afforded the opportunity to review and render advice to the Village Corporations on all land sales, leases or other transactions prior to any final commitment.

There is authorized to be appropriated such sums as may be necessary for the purpose of providing technical assistance to Village Corporations established pursuant to this chapter in order that they may fulfill the reconveyance requirements of this subsection. The Secretary may make funds available as grants to ANCSA or nonprofit corporations that maintain in-house land planning and management capabilities.

* * *

(f) Patents to Village Corporations for surface estates and to Regional Corporations for subsurface estates; excepted lands; mineral rights, consent of Village Corporations

When the Secretary issues a patent to a Village Corporation for the surface estate in lands pursuant to subsections (a) and (b) of this section, he shall issue to the Regional Corporation

for the region in which the lands are located a patent to the subsurface estate in such lands, except lands located in the National Wildlife Refuge System and lands withdrawn or reserved for national defense purposes, including Naval Petroleum Reserve Numbered 4, for which in lieu rights are provided for in section 1611(a)(1) of this title: *Provided*, That the right to explore, develop, or remove minerals from the subsurface estate in the lands within the boundaries of any Native village shall be subject to the consent of the Village Corporation.

* * *

(h) Authorization for land conveyances; surface and subsurface estates

The Secretary is authorized to withdraw and convey 2 million acres of unreserved and unappropriated public lands located outside the areas withdrawn by sections 1610 and 1615 of this title, and follows:

(1) The Secretary may withdraw and convey to the appropriate Regional Corporation fee title to existing cemetery sites and historical places. Only title to the surface estate shall be conveyed for lands located in a Wildlife Refuge, when the cemetery or historical site is greater than 640 acres.

(2) The Secretary may withdraw and convey to a Native group that does not qualify as a Native village, if it incorporates under the laws of Alaska, title to the surface estate in not more than 23,040 acres surrounding the Native group's locality. The subsurface estate in such land shall be conveyed to the appropriate Regional Corporation unless the lands are located in a Wildlife Refuge;

(3) The Secretary may withdraw and convey to the Natives residing in Sitka, Kenai, Juneau, and Kodiak, if they

incorporate under the laws of Alaska, the surface estate of lands of a similar character in not more than 23,040 acres of land, which shall be located in reasonable proximity to the municipalities. The subsurface estate in such lands shall be conveyed to the appropriate Regional Corporation unless the lands are located in a Wildlife Refuge;

(4) The Secretary shall withdraw only such lands surrounding the villages and municipalities as are necessary to permit the conveyance authorized by paragraphs (2) and (3) to be planned and effected;

(5) The Secretary may convey to a Native, upon application within two years from December 18, 1971, the surface estate in not to exceed 160 acres of land occupied by the Native as a primary place of residence on August 31, 1971. Determination of occupancy shall be made by the Secretary, whose decision shall be final. The subsurface estate in such lands shall be conveyed to the appropriate Regional Corporations unless the lands are located in a Wildlife Refuge;

(6) The Secretary shall charge against the 2 million acres authorized to be conveyed by this section all allotments approved pursuant to section 1617 of this title during the four years following December 18, 1971. Any minerals reserved by the United States pursuant to the Act of March 8, 1922 (42 Stat. 415), as amended [43 U.S.C. 270-11 to 270-13], in a Native Allotment approved pursuant to section 1617 of this title during the period December 18, 1971, through December 18, 1975, shall be conveyed to the appropriate Regional Corporation, unless such lands are located in a Wildlife Refuge or in the Lake Clark areas as provided in section 12 of the Act of January 2, 1976 (Public Law 94-204), as amended.

(7) The Secretary may withdraw and convey lands out of the National Wildlife Refuge System and out of the National

Forests, for the purposes set forth in paragraphs (1), (2), (3), and (5) of this subsection; and

(8)(A) Any portion of the 2 million acres not conveyed by this subsection shall be allocated and conveyed to the Regional Corporations on the basis of population.

(B) Such allocation as the Regional Corporation for southeastern Alaska shall receive under this paragraph shall be selected and conveyed from lands that were withdrawn by sections 1615(a) and 1615(d) of this title and not selected by the Village Corporations in southeastern Alaska; * * * .

* * *

§ 1613 note

Pub.L. 94-204, § 2, Jan. 2, 1976, 89 Stat. 1146, as amended by Pub.L. 96-487, Title XIV, § 1411, Dec. 2, 1980, 94 Stat. 2497; Pub.L. 99-396, § 22, Aug. 27, 1986, 100 Stat. 846; Pub.L. 100-581, Title II, § 218, Nov. 1, 1988, 102 Stat. 2942, provided that:

"(a)(1) During the period of the appropriate withdrawal for selection pursuant to the Settlement Act [this chapter], any and all proceeds derived from contracts, leases, licenses, permits, rights-of-way, or easements, or from trespass occurring after the date of withdrawal of the lands for selection, pertaining to lands or resources of lands, including wildlife proceeds received between the date of withdrawal and the date of conveyance from harvests on lands conveyed pursuant to the Act, withdrawn for Native selection pursuant to the Settlement Act shall be deposited in an escrow account which shall be held by the Secretary until lands selected pursuant to that Act have been conveyed to the selecting Corporation or individual entitled to receive benefits under such Act.

"(2) Such proceeds which were received, if any, subsequent to the date of withdrawal of the land for selection, but were not deposited in the escrow account shall be identified by the Secretary within two years of the date of conveyance or this Act [probably means Dec. 2, 1980], whichever is later, and shall be paid, together with interest payable on the proceeds from the date of receipt by the United States to the date of payment to the appropriate Corporation or individual to which the land was conveyed by the United States: *Provided*, That the interest on proceeds received prior to January 2, 1976, shall be calculated and paid at the rate of the earnings on Individual Indian Moneys in the custody of the Secretary of the Interior pursuant to sections 463 and 465 of the Revised Statutes (25 U.S.C. 2 and 9) and invested by him pursuant to the Act of June 24, 1938 (25 U.S.C. 162a), from the date of receipt to January 2, 1976. Effective January 2, 1976, the interest so calculated shall be added to the principal amount of such proceeds. The interest on this total amount and on proceeds received on or after January 2, 1976, shall be calculated and paid as though such proceeds and previously calculated interest had been deposited in the escrow account from January 2, 1976, or the date of receipt, whichever occurs later, to the date of payment to the affected Corporation.

"(3) Such proceeds which have been deposited in the escrow account shall be paid, together with interest accrued by the Secretary to the appropriate Corporation or individual upon conveyance of the particular withdrawn lands. In the event that a conveyance does not cover all of the land embraced within any contract, lease, license, permit, right-of-way, easement, or trespass, the Corporation or individual shall only be entitled to the proportionate amount of the proceeds, including interest accrued, derived from such contract, lease, license, permit, right-of-way, or easement, which results from multiplying the total of such proceeds, including interest accrued, by a fraction

in which the numerator is the acreage of such contract, lease, license, permit, right-of-way, or easement which is included in the conveyance and the denominator is the total acreage contained in such contract, lease, license, permit, right-of-way, or easement; in the case of trespass, the conveyee shall be entitled to the proportionate share of the proceeds, including a proportionate share of interest accrued, in relation to the damages occurring on the respective lands during the period the lands were withdrawn for selection.

"(4) Such proceeds which have been deposited in the escrow account pertaining to lands withdrawn but not selected pursuant to such Act [this chapter], or selected but not conveyed due to rejection or relinquishment of the selection, shall be paid, together with interest accrued, as would have been required by law were it not for the provisions of this Act [enacting sections 1625 to 1627 of this title, amending sections 1615, 1616, 1620 and 1621 of this title, and enacting provisions set out as notes under this section and sections 1604, 1605, 1611, 1618, and 1625 of this title].

"(5) Lands withdrawn under this subsection include all Federal lands identified under appendices A, B-1 and B-2 of the document referred to in section 12 of the Act of January 2, 1976 (Public Law 94-204) [set out as a note under section 1611 of this title] for Cook Inlet Region, Incorporated, and are deemed withdrawn as of the date established in subsection (a) of section 2 of the Act of January 2, 1976 [this subsection].

"(b) The Secretary is authorized to deposit in the Treasury of the United States the escrow account proceeds referred to in subsection (a) of this section, and the United States shall pay interest thereon semiannually from the date of deposit to the date of payment with simple interest at the rate determined by the Secretary of the Treasury to be the rate payable on short-term obligations of the United States prevailing at the time of payment: *Provided*, That the Secretary in his discretion may

withdraw such proceeds from the United States Treasury and reinvest such proceeds in the manner provided by the first section of the Act of June 24, 1938 (52 U.S.C. 1037) [section 162a of Title 25]: *Provided further*, That this section shall not be construed to create or terminate any trust relationship between the United States and any corporation or individual entitled to receive benefits under the Settlement Act [this chapter].

"(c) Any and all proceeds from public easements reserved pursuant to section 17(b)(3) of the Settlement Act [Section 1616(b)(3) of this title], from or after the date of enactment of this Act [Jan. 2, 1976], shall be paid to the grantee of such conveyance in accordance with such grantee's proportionate share.

"(d) To the extent that there is a conflict between the provisions of this section and any other Federal laws applicable to Alaska, the provisions of this section will govern. Any payment made to any corporation or any individual under authority of this section shall not be subject to any prior obligation under section 9(d) or 9(f) of the Settlement Act [section 1608(d) or section 1608 (f) of this title].

"(e) The Secretary shall calculate the amounts payable pursuant to this section and notify the affected Corporation of the results of his calculations. The affected Corporation shall have thirty days in which to appeal the Secretary's calculations after which the Secretary shall promptly make a final determination of the amounts payable. The Secretary shall certify such final determinations to the Secretary of the Treasury and each determination shall constitute a final judgment, award, or compromise settlement under section 1304 of title 31 of the United States Code. The Secretary of the Treasury is authorized and directed to pay such amounts to the appropriate Corporation out of funds in the Treasury: *Provided*, That if the lands from which the proceeds and

interest entitlement are derived have not been conveyed to the selecting Native Corporation at the time the Secretary makes his final determination, the Secretary of the Treasury is authorized and directed to pay such amount into the escrow account where it will earn interest and be disbursed in the same manner as other proceeds and interest."

* * *

§ 1615. Withdrawal and selection of public lands; funds in lieu of acreage

(a) Withdrawal of public lands; list of Native villages

All public lands in each township that encloses all or any part of a Native village listed below, and in each township that is contiguous to or corners on such township, except lands withdrawn or reserved for national defense purposes, are hereby withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from selection under the Alaska Statehood Act, as amended:

Angoon, Southeast.
Craig, Southeast.
Hoonah, Southeast.
Hydaburg, Southeast.
Kake, Southeast.
Kasaan, Southeast.
Klawock, Southeast.
Saxman, Southeast.
Yakutat, Southeast.

(b) Native land selections; Village Corporations for listed Native villages; acreage; proximity of

selections; conformity to Lands Survey System

During a period of three years from December 18, 1971, each Village Corporation for the villages listed in subsection (a) of this section shall select, in accordance with rules established by the Secretary, an area equal to 23,040 acres, which must include the township or townships in which all or part of the Native village is located, plus, to the extent necessary, withdrawn lands from the townships that are contiguous to or corner on such townships. All selections shall be contiguous and in reasonably compact tracts, except as separated by bodies of water, and shall conform as nearly as practicable to the United States Lands Survey System.

* * *

§ 1618. Reservations; revocation; excepted reserve; acquisition of title to surface and subsurface estates in reserve; election of Village Corporations

(a) Notwithstanding any other provision of law, and except where inconsistent with the provisions of this chapter, the various reserves set aside by legislation or by Executive or Secretarial Order for Native use or for administration of Native affairs, including those created under section 497 of Title 25, are hereby revoked subject to any valid existing rights of non-Natives. This section shall not apply to the Annette Island Reserve established by section 495 of Title 25 and no person enrolled in the Metlakatla Indian community of the Annette Island Reserve shall be eligible for benefits under this chapter.

(b) Notwithstanding any other provision of law or of this chapter, any Village Corporation or Corporations may elect within two years to acquire title to the surface and subsurface

estates in any reserve set aside for the use or benefit of its stockholders or members prior to December 18, 1971. If two or more villages are located on such reserve, the election must be made by all of the members or stockholders of the Village Corporations concerned. In such event, the Secretary shall convey the land to the Village Corporation or Corporations, subject to valid existing rights as provided in section 1613(g) of this title, and the Village Corporation shall not be eligible for any other land selections under this chapter or to any distribution of Regional Corporations funds pursuant to section 1606 of this title, and the enrolled residents of the Village Corporation shall not be eligible to receive Regional Corporation stock.

* * *

§ 1620. Taxation

(a) Fund revenues exemption; investment income taxable

Revenues originating from the Alaska Native Fund shall not be subject to any form of Federal, State, or local taxation at the time of receipt by a Regional Corporation, Village Corporation, or individual Native through dividend distributions (even if the Regional Corporation or Village Corporation distributing the dividend has not segregated revenue received from the Alaska Native Fund from revenue received from other sources) or in any other manner. This exemption shall not apply to income from the investment of such revenues.

(b) Shares of stock exemption

The receipt of shares of stock in the Regional or Village Corporations by or on behalf of any Native shall not be subject

to any form of Federal, State or local taxation.

(c) Land or land interests exemption; basis for sale or other disposition, adjustment; basis for interest in mine, well, other, natural deposit, or block of timber, adjustment

The receipt of land or any interest therein pursuant to this chapter or of cash in order to equalize the values of properties exchanged pursuant to section 1621(f) of this title shall not be subject to any form of Federal, State, or local taxation. The basis for determining gain or loss from the sale or other disposition of such land or interest in land for purposes of any Federal, State, or local tax imposed on or measured by income shall be the fair value of such land or interest in land at the time of receipt, adjusted as provided in section 1016 of Title 26, as amended: *Provided, however*, That the basis of any such land or interest therein attributable to an interest in a mine, well, other natural deposit, or block of timber shall be not less than the fair value of such mine, well, natural deposit, or block of timber (or such interest therein as the Secretary shall convey) at the time of the first commercial development thereof, adjusted as provided in section 1016 of Title 26. For purposes of this subsection, the time of receipt of land or any interest therein shall be the time of the conveyance by the Secretary of such land or interest (whether by interim conveyance or patent).

(d) Real property interests; exemption period for conveyance of interests not developed or leased or interests used solely for exploration, interests taxable; derivative revenues taxable; exchanges; simultaneous exchanges

(1) Real property interests conveyed, pursuant to this

chapter, to a Native individual, Native Group, Village or Regional Corporation or corporation established pursuant to section 1613(h)(3) of this title which are not developed or leased to third parties or which are used solely for the purposes of exploration shall be exempt from State and local real property taxes for a period of twenty years from the vesting of title pursuant to the Alaska National Interest Lands Conservation Act or the date of issuance of an interim conveyance or patent, whichever is earlier, for those interests to such individual, group, or corporation: *Provided*, That municipal taxes, local real property taxes, or local assessments may be imposed upon any portion of such interest within the jurisdiction of any governmental unit under the laws of the State which is leased or developed for purposes other than exploration for so long as such portion is leased or being developed: *Provided further*, That easements, rights-of-way, leaseholds, and similar interests in such real property may be taxed in accordance with State or local law. All rents, royalties, profits, and other revenues or proceeds derived from such property interests shall be taxable to the same extent as such revenues or proceeds are taxable when received by a non-Native individual or corporation.

(2) Any real property interest, not developed or leased to third parties, acquired by a Native individual, Native Group, Village or Regional Corporation, or corporation established pursuant to section 1613(h)(3) of this title in exchange for real property interests which are exempt from taxation pursuant to paragraph (1) of this subsection shall be deemed to be a property interest conveyed pursuant to this chapter and shall be exempt from taxation as if conveyed pursuant to this chapter, when such an exchange is made with the Federal Government, the State government, a municipal government, or another Native Corporation, or, if neither party to the exchange receives a cash value greater than 25 per centum of the value of the land

exchanged, a private party. In the event that a Native Corporation simultaneously exchanges two or more tracts of land having different periods of tax exemption pursuant to this subsection, the periods of tax exemption for the exchanged lands received by such Native Corporation shall be determined (A) by calculating the percentage that the acreage of each tract given up bears to the total acreage given up, and (B) by applying such percentages and the related periods of tax exemption to the acreage received in exchange.

(e) Public lands status of real property interests exempt from real estate taxes for purposes of Federal highway and education laws; Federal fire protection services for real property interests without cost

Real property interests conveyed pursuant to this chapter to a Native individual, Native group, corporation organized under section 1613(h)(3) of this title, or Village or Regional Corporation shall, so long as the fee therein remains not subject to State or local taxes on real estate, continue to be regarded as public lands for the purpose of computing the Federal share of any highway project pursuant to Title 23, as amended and supplemented, for the purpose of the Johnson-O'Malley Act of April 16, 1934, as amended (25 U.S.C. 452), and for the purpose of Public Laws 815 and 874, 81st Congress (64 Stat. 967, 1100). So long as there are no substantial revenues from such lands they shall continue to receive wildland fire protection services from the United States at no cost.

(f) Stocks of Regional and Village Corporations exempt from estate taxes; period of exemption

Until January 1, 1992, stock of any Regional Corporation organized pursuant to section 1606 of this title, including the

right to receive distributions under subsection 1606(j) of this title, and stock of any Village Corporation organized pursuant to section 1607 of this title shall not be includable in the gross estate of a decedent under sections 2031 and 2033, or any successor provisions, of Title 26.

(g) Resource information or analysis; professional or technical services

In the case of any Native Corporation established pursuant to this chapter, income for purposes of any form of Federal, State, or local taxation shall not be deemed to include the value of--

(1) the receipt, acquisition, or use of any resource information or analysis (including the receipt of any right of access to such information or analysis) relating to lands or interests therein conveyed, selected but not conveyed, or available for selection pursuant to this chapter;

(2) the promise or performance by any person or by any Federal, State, or local government agency of any professional or technical services relating to the resources of lands or interests therein conveyed, selected but not conveyed, or available for selection pursuant to this chapter, including, but not limited to, services in connection with exploration on such lands for oil, gas, or other minerals; and

(3) the expenditure of funds, incurring of costs, or the use of any equipment or supplies by any person or any Federal, State, or local government agency, or any promise, agreement, or other arrangement by such person or agency to expend funds or use any equipment or supplies for the purpose of creating, developing, or acquiring the resource information or analysis described in paragraph (1) or for the purpose of performing or otherwise furnishing the services described in paragraph (2): *Provided*, That this paragraph shall not apply to any funds paid

to a Native Corporation established pursuant to this chapter or to any subsidiary thereof.

This subsection shall be effective as of December 18, 1971, and, with respect to each Native Corporation, shall remain in full force and effect for a period of twenty years thereafter or until the Corporation has received conveyance of its full land entitlement, whichever first occurs. Except as set forth in this subsection and in subsection (d) of this section all rents, royalties, profits, and other revenues or proceeds derived from real property interests selected and conveyed pursuant to sections 1611 and 1613 of this title shall be taxable to the same extent as such revenues or proceeds are taxable when received by a non-Native individual or corporation.

(h) Date of incorporation as date of trade or business; ordinary and necessary expenses

(1) Notwithstanding any other provision of law, each Native Corporation established pursuant to this chapter shall be deemed to have become engaged in carrying on a trade or business as of the date it was incorporated for purposes of any form of Federal, State, or local taxation.

(2) All expenses heretofore or hereafter paid or incurred by a Native Corporation established pursuant to this chapter in connection with the selection or conveyance of lands pursuant to this chapter, or in assisting another Native Corporation within or for the same region in the selection or conveyance of lands under this chapter, shall be deemed to be or to have been ordinary and necessary expenses of such Corporation, paid or incurred in carrying on a trade or business for purposes of any form of Federal, State, or local taxation.

(i) Personal Holding Company Act exemption

No Corporation created pursuant to this chapter shall be considered to be a personal holding company within the meaning of section 542(a) of Title 26 prior to January 1, 1992.

(j) Shareholder homesites

A real property interest distributed by a Native Corporation to a shareholder of such Corporation pursuant to a program to provide homesites to its shareholders, shall be deemed conveyed and received pursuant to this chapter: *Provided*, That alienability of the Settlement Common Stock of the Corporation has not been terminated pursuant to section 1629c of this title: *Provided further*, That the land received is restricted by covenant for a period not less than ten years to single-family (including traditional extended family customs) residential occupancy, and by such other covenants and retained interests as the Native Corporation deems appropriate: *Provided further*, That the land conveyed does not exceed one and one-half acres: *Provided further*, That if the shareholder receiving the homesite subdivides such homesite, he or she shall pay all Federal, State, and local taxes that would have been incurred but for this subsection together with simple interest at 6 per centum per annum calculated from the date of receipt of the homesite, including taxes or assessments for the provision of road access and water and sewage facilities by the conveying corporation or the shareholder.

* * *

§ 1621. Miscellaneous provisions

* * *

(j) Interim conveyances and underselections

(1) Where lands to be conveyed to a Native, Native Corporation, or Native group pursuant to this chapter as amended and supplemented have not been surveyed, the same may be conveyed by the issuance of an "interim conveyance" to the party entitled to the lands. Subject to valid existing rights and such conditions and reservations authorized by law as are imposed, the force and effect of such an interim conveyance shall be to convey to and vest in the recipient exactly the same right, title, and interest in and to the lands as the recipient would have received had he been issued a patent by the United States. Upon survey of lands covered by an interim conveyance a patent thereto shall be issued to the recipient. The boundaries of the lands as defined and conveyed by the interim conveyance shall not be altered but may then be redescribed, if need be, in reference to the plat of survey. The Secretary shall make appropriate adjustments to insure that the recipient receives his full entitlement. Where the term "patent," or a derivative thereof, is used in this chapter unless the context precludes such construction, it shall be deemed to include "interim conveyance," and the conveyances of land to Natives and Native Corporations provided for this chapter shall be as fully effectuated by the issuance of interim conveyances as by the issuance of patents.

(2) Where lands selected and conveyed, or to be conveyed to a Village Corporation are insufficient to fulfill the Corporation's entitlement under section 1611(b), 1613(a), 1615(b), or 1615(d) of this title, the Secretary is authorized to

withdraw twice the amount of unfulfilled entitlement and provide the Village Corporation ninety days from receipt of notice from the Secretary to select from the lands withdrawn the land it desires to fulfill its entitlement. In making the withdrawal, the Secretary shall first withdraw public lands that were formerly withdrawn for selection by the concerned Village Corporation by or pursuant to section 1610(a)(1), 1610(a)(3), 1615(a), or 1615(d) of this title. Should such lands no longer be available, the Secretary may withdraw public lands that are vacant, unreserved, and unappropriated, except that the Secretary may withdraw public lands which had been previously withdrawn pursuant to section 1616(d) of this title. Any subsequent selection by the Village Corporation shall be in the manner provided in this chapter for such original selections.

* * *

(l) Land selection limitation; proximity to home rule or first class city and Ketchikan

Notwithstanding any provision of this chapter, no Village or Regional Corporation shall select lands which are within two miles from the boundary, as it exists on December 18, 1971, of any home rule or first class city (excluding boroughs) or which are within six miles from the boundary of Ketchikan.

§ 1622. Annual reports to Congress until 1984; submission in 1985 of report of status of Natives, summary of actions taken, and recommendations

The Secretary shall submit to the Congress annual reports on implementation of this chapter. Such reports shall be filed by the Secretary annually until 1984. At the beginning of the first

session of Congress in 1985 the Secretary shall submit, through the President, a report of the status of the Natives and Native groups in Alaska, and a summary of actions taken under this chapter, together with such recommendations as may be appropriate.

* * *

§ 1624. Regulations; issuance; publication in Federal Register

The Secretary is authorized to issue and publish in the Federal Register, pursuant to subchapter II of chapter 5 of Title 5, such regulations as may be necessary to carry out the purposes of this chapter.

* * *

§ 1625. Securities laws exemption

(a) Laws; termination date of exempt status

A Native Corporation shall be exempt from the provisions, as amended, of the Investment Company Act of 1940 (54 Stat. 789), [15 U.S.C. 80a-1 et seq.], the Securities Act of 1933 (48 Stat. 74) [15 U.S.C. 77a et seq.], and the Securities Exchange Act of 1934 (48 Stat. 881) [15 U.S.C. 78a et seq.], until the earlier of the day after--

(1) the date on which the corporation issues shares of stock other than Settlement Common Stock in a transaction where--

(A) the transaction or the shares are not otherwise exempt from Federal securities laws; and

(B) the shares are issued to persons or entities other than--

(i) individuals who held shares in the corporation on

February 3, 1988;

(ii) Natives;

(iii) descendants of Natives;

(iv) individuals who have received shares of Settlement Common Stock by inheritance pursuant to section 1606(h)(2) of this title;

(v) Settlement Trusts; or

(vi) entities established for the sole benefit of Natives or descendants of Natives; or

(2) the date on which alienability restrictions are terminated; or

(3) the date on which the corporation files a registration statement with the Securities and Exchange Commission pursuant to either the Securities Act of 1933 [15 U.S.C. 77a et seq.] or the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.].

(b) Status of Native Corporations after termination date

No provision of this section shall be construed to require or imply that a Native Corporation shall, or shall not, be subject to provisions of the Acts listed in subsection (a) of this section after any of the dates described in subsection (a) of this section.

(c) Annual report to shareholders; shareholders of record

(1) A Native Corporation that, but for this section, would be subject to the provisions of the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.] shall annually prepare and transmit to its shareholders a report that contains substantially all the information required to be included in an annual report to shareholders by a corporation subject to that Act.

(2) For purposes of determining the applicability of the

registration requirements of the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.] on or after the date described in subsection (a) of this section, holders of Settlement Common Stock shall be excluded from the calculation of the number of shareholders of record pursuant to section 12(g) of that Act [15 U.S.C. 78l (g)].

(d) Wholly owned subsidiaries; Settlement Trusts; voluntary registration as Investment Company

(1) Notwithstanding any other provision of law, prior to January 1, 2001, the provisions of the Investment Company Act of 1940 [15 U.S.C. 80a-1 et seq.] shall not apply to any Native Corporation or any subsidiary of such corporation if such subsidiary is wholly owned (as that term is defined in the Investment Company Act of 1940 [15 U.S.C. 80a-1 et seq.] by the corporation and the corporation owns at least 95 per centum of the equity of the subsidiary.

(2) The Investment Company Act of 1940 [15 U.S.C. 80a-1 et seq.] shall not apply to any Settlement Trust.

(3) If, but for this section, a Native Corporation would qualify as an Investment Company under the Investment Company Act of 1940 [15 U.S.C. 80a-1 et seq.], it shall be entitled to voluntarily register pursuant to such Act and any such corporation which so registered shall thereafter comply with the provisions of such Act.

§ 1626. Relation to other programs

(a) Continuing availability of otherwise available governmental programs

The payments and grants authorized under this chapter constitute compensation for the extinguishment of claims to

land, and shall not be deemed to substitute for any governmental programs otherwise available to the Native people of Alaska as citizens of the United States and the State of Alaska.

(b) Food stamp program

Notwithstanding section 5(a) and any other provision of the Food Stamp Act of 1964 (78 Stat. 703), as amended [7 U.S.C. 2011 et seq.], in determining the eligibility of any household to participate in the food stamp program, any compensation, remuneration, revenue, or other benefit received by any member of such household under this chapter shall be disregarded.

(c) Eligibility for need-based Federal programs

In determining the eligibility of a household, an individual Native, or a descendant of a Native (as defined in section 1602(r) of this title) to--

(1) participate in the Food Stamp Program,

(2) receive aid, assistance, or benefits, based on need, under the Social Security Act [42 U.S.C. 301 et seq.], or

(3) receive financial assistance or benefits, based on need, under any other Federal program or federally-assisted program,

none of the following received from a Native Corporation, shall be considered or taken into account as an asset or resource:

(A) cash (including cash dividends on stock received from a Native Corporation) to the extent that it does not, in the aggregate, exceed $2,000 per individual per annum;

(B) stock (including stock issued or distributed by a Native Corporation as a dividend or distribution on stock);

(C) a partnership interest;

(D) land or an interest in land (including land or an interest in land received from a Native Corporation as a dividend or distribution on stock); and

(E) an interest in a settlement trust.

(d) Federal Indian programs

Notwithstanding any other provision of law, Alaska Natives shall remain eligible for all Federal Indian programs on the same basis as other Native Americans.

(e) Minority status and economically disadvantaged status

(1) For all purposes of Federal law, a Native Corporation shall be considered to be a corporation owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the Settlement Common Stock of the corporation and other stock of the corporation held by holders of Settlement Common Stock and by Natives and descendants of Natives, represents a majority of both the total equity of the corporation and the total voting power of the corporation for the purposes of electing directors.

(2) For all purposes of Federal law, direct and indirect subsidiary corporations, joint ventures, and partnerships of a Native Corporation qualifying pursuant to paragraph (1) shall be considered to be entities owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the shares of stock or other units of ownership interest in any such entity held by such Native Corporation and by the holders of its Settlement Common Stock represent a majority of both--

(A) the total equity of the subsidiary corporation, joint venture, or partnership; and

(B) the total voting power of the subsidiary corporation, joint venture, or partnership for the purpose of electing directors, the general partner, or principal officers.

(3) No provision of this subsection shall--

(A) preclude a Federal agency or instrumentality from applying standards for determining minority ownership (or control) less restrictive than those described in paragraphs (1) and (2), or

(B) supersede any such less restrictive standards in existence on February 3, 1988.

* * *

(g) Civil Rights Act of 1964

For the purposes of implementation of the Civil Rights Act of 1964 [42 U.S.C. 2000a et seq.], a Native Corporation and corporations, partnerships, joint ventures, trusts, or affiliates in which the Native Corporation owns not less than 25 per centum of the equity shall be within the class of entities excluded from the definition of "employer" by section 701(b)(1) of Public Law 88-352 (78 Stat. 253) [42 U.S.C. 2000e(b)(1)], as amended, or successor statutes.

§ 1627. Merger of Native corporations

(a) Applicability of State law

Notwithstanding any provision of this chapter, any corporation created pursuant to section 1606(d), 1607(a), 1613(h)(2), or 1613(h)(3) of this title within any of the twelve regions of Alaska, as established by section 1606(a) of this title, may, at any time, merge or consolidate, pursuant to the applicable provisions of the laws of the State of Alaska, with

any other of such corporation or corporations created within or for the same region. Any corporations resulting from mergers or consolidations further may merge or consolidate with other such merged or consolidated corporations within the same region or with other of the corporations created in said region pursuant to section 1606(d), 1607(a), 1613(h)(2), or 1613(h)(3) of this title.

(b) Terms and conditions of merger; rights of dissenting shareholders; rights and liabilities of successor corporation

Such mergers or consolidations shall be on such terms and conditions as are approved by vote of the shareholders of the corporations participating therein, including, where appropriate, terms providing for the issuance of additional shares of Regional Corporation stock to persons already owning such stock, and may take place pursuant to votes of shareholders held either before or after January 2, 1976: *Provided*, That the rights accorded under Alaska law to dissenting shareholders in a merger or consolidation may not be exercised in any merger or consolidation pursuant to this chapter effected while the Settlement Common Stock of all corporations subject to merger or consolidation remains subject to alienability restrictions. Upon the effectiveness of any such mergers or consolidations the corporations resulting therefrom and the shareholders thereof shall succeed and be entitled to all the rights, privileges, and benefits of this chapter, including but not limited to the receipt of lands and moneys and exemptions from various forms of Federal, State, and local taxation, and shall be subject to all the restrictions and obligations of this chapter as are applicable to the corporations and shareholders which and who participated in said mergers or consolidations or as would have been applicable if the mergers or consolidations and transfers

of rights and titles thereto had not taken place: *Provided*, That, where a Village Corporation organized pursuant to section 1618(b) of this title merges or consolidates with the Regional Corporation of the region in which such village is located or with another Village Corporation of that region, no provision of such merger or consolidation shall be construed as increasing or otherwise changing regional enrollments for purposes of distribution of the Alaska Native Fund; land selection eligibility; or revenue sharing pursuant to sections 1605(c), 1606(m), 1611(b), 1613(h)(8), and 1606(i) of this title.

(c) Alteration or elimination of dividend rights

Notwithstanding the provisions of section 1606(j) or (m) of this title, in any merger or consolidation in which the class of stockholders of a Regional Corporation who are not residents of any of the villages in the region are entitled under Alaska law to vote as a class, the terms of the merger or consolidation may provide for the alteration or elimination of the right of said class to receive dividends pursuant to said section 1606(j) or (m) of this title. In the event that such dividend right is not expressly altered or eliminated by the terms of the merger or consolidation, such class of stockholders shall continue to receive such dividends pursuant to section 1606(j) or (m) of this title as would have been applicable if the merger or consolidation had not taken place and all Village Corporations within the affected region continued to exist separately.

(d) Approval of merger or consolidation by shareholders

Notwithstanding any other provision of this section or of any other law, no corporation referred to in this section may merger or consolidate with any other such corporations unless that corporation's shareholders have approved such merger or

consolidation.

(e) Conveyance of right to withhold consent to mineral exploration, development, etc., as part of merger or consolidation

The plan of merger or consolidation shall provide that the right of any affected Village Corporation pursuant to section 1613(f) of this title to withhold consent to mineral exploration, development, or removal within the boundaries of the Native village shall be conveyed, as part of the merger or consolidation, to a separate entity composed of the Native residents of such Native village.

* * *

§ 1629b. Procedures for considering amendments and resolutions

(a) Coverage

Notwithstanding any provision of the articles of incorporation and bylaws of a Native Corporation or of the laws of the State, except those related to proxy statements and solicitations that are not inconsistent with this section--

(1) an amendment to the articles of incorporation of a Native Corporation authorized by subsections (g) and (h) of section 1606 of this title, subsection (d)(1)(B) of this section, or section 1629c of this title;

(2) a resolution authorized by section 1629d(a)(2) of this title;

(3) a resolution to establish a Settlement Trust; or

(4) a resolution to convey all or substantially all of the assets of a Native Corporation to a Settlement Trust pursuant to

section 1629e(a)(1) of this title;
shall be considered in accordance with the provisions of this section.

(b) Basic procedure

(1) An amendment or resolution described in subsection (a) of this section may be approved by the board of directors of a Native Corporation in accordance with its bylaws. If the board approves the amendment or resolution, it shall direct that the amendment or resolution be submitted to a vote of the shareholders at the next annual meeting or at a special meeting (if the board, at its discretion, schedules such special meeting). One or more such amendments or resolutions may be submitted to the shareholders and voted upon at one meeting.

(2)(A) A written notice (including a proxy statement if required under applicable law), setting forth the amendment or resolution approved pursuant to paragraph (1) (and, at the discretion of the board, a summary of the changes to be effected) together with any amendment or resolution submitted pursuant to subsection (c) of this section and the statements described therein shall be sent, not less than fifty days nor more than sixty days prior to the meeting of the shareholders, by first-class mail or hand-delivered to each shareholder of record entitled to vote at his or her address as it appears in the records of the Native Corporation. The corporation may also communicate with its shareholders at any time and in any manner authorized by the laws of the State.

(B) The board of directors may, but shall not be required to, appraise or otherwise determine the value of--

(i) land conveyed to the corporation pursuant to section 1613(h)(1) of this title or any other land used as a cemetery;

(ii) the surface estate of land that is both--

(I) exempt from real estate taxation pursuant to section

1636(d)(1)(A) of this title; and

(II) used by the shareholders of the corporation for subsistence uses (as defined in section 3113 of Title 16); or

(iii) land or interest in land which the board of directors believes to be only of speculative value;

in connection with any communication made to the shareholders pursuant to this subsection.

(C) If the board of directors determines, for quorum purposes or otherwise, that a previously-noticed meeting must be postponed or adjourned, it may, by giving notice to the shareholders, set a new date for such meeting not more than forty-five days later than the original date without sending the shareholders a new written notice (or a new summary of changes to be effected). If the new date is more than forty-five days later than the original date, however, a new written notice (and a new summary of changes to be effected if such a summary was originally sent pursuant to subparagraph (A)), shall be sent or delivered to shareholders not less than thirty days nor more than forty-five days prior to the new date.

(c) Shareholder petitions

(1)(A) With respect to an amendment authorized by section 1606(g)(1)(B) of this title or section 1629c(b) of this title or an amendment authorizing the issuance of stock subject to the restrictions provided by section 1606(g)(2)(B)(iii) of this title, the holders of shares representing at least 25 per centum of the total voting power of a Native Corporation may petition the board of directors to submit such amendment to a vote of the shareholders in accordance with the provisions of this section.

(B) The requirements of the laws of the State relating to the solicitation of proxies shall govern solicitation of signatures for a petition described in subparagraph (A) except that the requirements of Federal law shall govern the solicitation of

signatures for a petition that is to be submitted to a Native Corporation which at the time of such submission has issued a class of equity securities registered pursuant to the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.]. If a petition meets the applicable solicitation requirements and--

(i) the board agrees with such petition, the board shall submit the amendment and either the proponents' statement or its own statement in support of the amendment to the shareholders for a vote, or

(ii) the board disagrees with the petition for any reason, the board shall submit the amendment and the proponents' statement to the shareholders for a vote and may, at its discretion, submit an opposing statement or an alternative amendment.

(2) Paragraph (1) shall not apply to a Native Corporation that on or before the date one year after February 3, 1988 elects application of section 1629c(d) of this title in lieu of section 1629c(b) of this title. Until December 18, 1991, paragraph (1) shall not apply to a Native Corporation that elects application of section 1629c(c) of this title in lieu of section 1629c(b) of this title. Insofar as they are not inconsistent with this section, the laws of the State shall govern any shareholder right of petition for Native Corporations.

(d) Voting standards

(1) An amendment or resolution described in subsection (a) of this section shall be considered to be approved by the shareholders of a Native Corporation if it receives the affirmative vote of shares representing--

(A) a majority of the total voting power of the corporation, or

(B) a level of the total voting power of the corporation greater than a majority (but not greater than two-thirds of the

total voting power of the corporation) if the corporation establishes such a level by an amendment to its articles of incorporation.

(2) A Native Corporation in amending its articles of incorporation pursuant to section 1606(g)(2) of this title to authorize the issuance of a new class or series of stock may provide that a majority (or more than a majority) of the shares of such class or series must vote in favor of an amendment or resolution described in subsection (a) of this section (other than an amendment authorized by section 1629c of this title) in order for such amendment or resolution to be approved.

(e) Voting power

For the purposes of this section, the determination of total voting power of a Native Corporation shall include all outstanding shares of stock that carry voting rights except shares that are not permitted to vote on the amendment or resolution in question because of restrictions in the articles of incorporation of the corporation.

§ 1629c. Duration of alienability restrictions

(a) General rule

Alienability restrictions shall continue until terminated in accordance with the procedures established by this section. No such termination shall take effect until after July 16, 1993: *Provided, however*, That this prohibition shall not apply to a Native Corporation whose board of directors approves, no later than March 1, 1992, a resolution (certified by the corporate secretary of such corporation) electing to decline the application of such prohibition.

(b) Opt-out procedure

(1)(A) A Native Corporation may amend its articles of incorporation to terminate alienability restrictions in accordance with this subsection. Only one amendment to terminate alienability restrictions shall be considered and voted on prior to December 18, 1991. Rejection of the amendment shall not preclude consideration prior to December 18, 1991, of subsequent amendments to terminate alienability restrictions.

(B) If an amendment to terminate alienability restrictions is considered, voted on, and rejected prior to December 18, 1991, then subsequent amendments to terminate alienability restrictions after December 18, 1991, shall be considered and voted on--

(i) in the case of an amendment submitted by the board of directors of the corporation on its own motion, not earlier than five years after the rejection of the most recently rejected amendment to terminate restrictions; or

(ii) in the case of an amendment submitted by the board of directors of the corporation pursuant to a shareholder petition, not earlier than two years after the rejection of the most recently rejected amendment to terminate restrictions.

(C) If no amendment to terminate alienability restrictions is considered and voted on prior to December 18, 1991, then amendments to terminate alienability restrictions after December 18, 1991, shall be considered and voted on--

(i) in the case of an amendment submitted by the board of directors of the corporation on its own motion, not more than once every five years; or

(ii) in the case of an amendment submitted by the board of directors of the corporation pursuant to a shareholder petition, not more than once every two years.

(2) An amendment authorized by paragraph (1) shall specify the time of termination, either by establishing a date certain or

by describing the specific event upon which alienability restrictions shall terminate.

(3) Dissenters rights may be granted by the corporation in connection with the rejection of an amendment to terminate alienability restrictions in accordance with section 1629d of this title. Once dissenters rights have been so granted, they shall not be granted again in connection with subsequent amendments to terminate alienability restrictions.

* * *

§ 1629d. Dissenters rights

(a) Coverage

(1) Notwithstanding the laws of the State, if the shareholders of a Native Corporation--

(A) fail to approve an amendment authorized by section 1629c(b) of this title to terminate alienability restrictions, a shareholder who voted for the amendment may demand payment from the corporation for all of his or her shares of Settlement Common Stock; or

(B) approve an amendment authorized by section 1629c(d) of this title to continue alienability restrictions without issuing alienable common stock pursuant to section 1629c(d)(6) of this title, a shareholder who voted against the amendment may demand payment from the corporation for all of his or her shares of Settlement Common Stock.

(2)(A) A demand for payment made pursuant to paragraph (1)(A) shall be honored only if at the same time as the vote giving rise to the demand, the shareholders of the corporation approved a resolution providing for the purchase of Settlement Common Stock from dissenting shareholders.

(B) A demand for payment made pursuant to paragraph

(1)(B) shall be honored.

(b) Relationship to State procedure

(1) Except as otherwise provided in this section, the laws of the State governing the right of a dissenting shareholder to demand and receive payment for his or her shares shall apply to demands for payment honored pursuant to subsection (a)(2) of this section.

(2) The board of directors of a Native Corporation may approve a resolution to provide a dissenting shareholder periods of time longer than those provided under the laws of the State to take actions required to demand and receive payment for his or her shares.

(c) Valuation of stock

(1) Prior to a vote described in subsection (a)(1) of this section, the board of directors of a Native Corporation may approve a resolution to provide that one or more of the following conditions will apply in the event a demand for payment is honored pursuant to subsection (a)(2) of this section--

(A) the Settlement Common Stock shall be valued as restricted stock; and

(B) the value of--

(i) any land conveyed to the corporation pursuant to section 1613(h)(1) of this title or any other land used as a cemetery; and

(ii) the surface estate of any land that is both--

(I) exempt from real estate taxation pursuant to section 1636(d)(1)(A) of this title, and

(II) used by the shareholders of the corporation for subsistence uses (as defined in section 3113 of Title 16); or

(iii) any land or interest in land which the board of directors believes to be only of speculative value;
shall be excluded by the shareholder making the demand for payment, the corporation purchasing the Settlement Common Stock of the shareholder, and any court determining the fair value of the shares of Settlement Common Stock to be purchased.

(2) No person shall have a claim against a Native Corporation or its board of directors based upon the failure of the board to approve a resolution authorized by this subsection.

(d) Form of payment

(1) Prior to a vote described in subsection (a)(1) of this section, the board of directors of a Native Corporation may approve a resolution to provide that in the event a demand for payment is honored pursuant to subsection (a)(2) of this section payments to each dissenting shareholder shall be made by the corporation through the issuance of a negotiable note in the principal amount of the payment due, which shall be secured by--

(A) a payment bond issued by an insurance company or financial institution;

(B) the deposit in escrow of securities or property having a fair market value equal to at least 125 per centum of the face value of the note; or

(C) a lien upon real property interests of the corporation valued at 125 percent or more of the face amount of the note, except that no such lien shall be applicable to--

(i) land conveyed to the corporation pursuant to section 1613(h)(1) of this title, or any other land used as a cemetery;

(ii) the percentage interest in the corporation's timber resources and subsurface estate that exceeds its percentage

interest in revenues from such property under section 1606(i) of this title; or

(iii) the surface estate of land that is both--

(I) exempt from real estate taxation pursuant to section 1636(d)(1)(A) of this title; and

(II) used by the shareholders of the corporation for subsistence uses (as defined in section 3113 of Title 16),

unless the Board of Directors of the corporation acts so as to make such lien applicable to such surface estate.

(2) A note issued pursuant to paragraph (1) shall provide that--

(A) interest shall be paid semi-annually, beginning as of the date on which the vote described in subsection (a)(1) of this section occurred, at the rate applicable on such date to obligations of the United States having a maturity date of one year, and

(B) the principal amount and accrued interest on such note shall be payable to the holder at a time specified by the corporation but in no event later than the date that is five years after the date of the vote described in subsection (a)(1) of this section.

(e) Dividend adjustment

(1) The cash payment made pursuant to subsection (a) of this section or the principal amount of a note issued pursuant to subsection (d) of this section to a dissenting shareholder shall be reduced by the amount of dividends paid to such shareholder with respect to his or her Settlement Common Stock after the date of the vote described in subsection (a)(1) of this section.

(2) Upon receipt of a cash payment pursuant to subsection (a) of this section or a note pursuant to subsection (d) of this

section, a dissenting shareholder shall no longer have an interest in the shares of Settlement Common Stock or in the Native Corporation.

§ 1629e. Settlement Trust option

(a) Conveyance of corporate assets

(1)(A) A Native Corporation may convey assets (including stock or beneficial interests therein) to a Settlement Trust in accordance with the laws of the State (except to the extent that such laws are inconsistent with this section and section 1629b of this title).

(B) The approval of the shareholders of the corporation in the form of a resolution shall be required to convey all or substantially all of the assets of the corporation to a Settlement Trust. A conveyance in violation of this clause shall be void ab initio and shall not be given effect by any court.

(2) No subsurface estate in land shall be conveyed to a Settlement Trust. A conveyance of title to, or any other interest in, subsurface estate in violation of this subparagraph shall be void ab initio and shall not be given effect by any court.

(3) Conveyances made pursuant to this subsection--

(A) shall be subject to applicable laws respecting fraudulent conveyance and creditors rights; and

(B) shall give rise to dissenters rights to the extent provided under the laws of the State only if the rights of beneficiaries in the Settlement Trust receiving a conveyance are inalienable.

(4) The provisions of this subsection shall not prohibit a Native Corporation from engaging in any conveyance, reorganization, or transaction not otherwise prohibited under the laws of the State or the United States.

(b) Authority and limitations of a Settlement Trust

(1) The purpose of a Settlement Trust shall be to promote the health, education, and welfare of its beneficiaries and preserve the heritage and culture of Natives. A Settlement Trust shall not--

(A) operate as a business;

(B) alienate land or any interest in land received from the settlor Native Corporation (except if the recipient of the land is the settlor corporation); or

(C) discriminate in favor of a group of individuals composed only or principally of employees, officers, or directors of the settlor Native Corporation.

An alienation of land or an interest in land in violation of this paragraph shall be void ab initio and shall not be given effect by any court.

(2) A Native Corporation that has established a Settlement Trust shall have exclusive authority to--

(A) appoint the trustees of the trust, and

(B) remove the trustees of the trust for cause.

Only a natural person shall be appointed a trustee of a Settlement Trust. An appointment or removal of a trustee in violation of this paragraph shall be void ab initio and shall not be given effect by any court.

(3) A Native Corporation that has established a Settlement Trust may expand the class of beneficiaries to include holders of Settlement Common Stock issued after the establishment of the trust without compensation to the original beneficiaries.

(4) A Settlement Trust shall not be held to violate any laws against perpetuities.

(c) Savings

(1) The provisions of this chapter shall continue to apply to any land or interest in land received from the Federal Government pursuant to this chapter and later conveyed to a Settlement Trust as if the land or interest in land were still held by the Native Corporation that conveyed the land or interest in land.

(2) No timber resources subject to section 1606(i) of this title conveyed to a Settlement Trust shall be sold, exchanged, or otherwise conveyed except as necessary to--

(A) dispose of diseased or dying timber or to prevent the spread of disease or insect infestation;

(B) prevent or suppress fire; or

(C) ensure public safety.

The revenue, if any, from such timber harvests shall be subject to section 1606(i) of this title as if such conveyance had not occurred.

(3) The conveyance of assets (including stock or beneficial interests) pursuant to subsection (a) of this section shall not affect the applicability or enforcement (including specific performance) of a valid contract, judgment, lien, or other obligation (including an obligation arising under section 1606(i) of this title) to which such assets, stock, or beneficial interests were subject immediately prior to such conveyance.

(4) A claim based upon paragraph (1), (2), or (3) shall be enforceable against the transferee Settlement Trust holding the land, interest in land, or other assets (including stock or beneficial interests) in question to the same extent as such claim would have been enforceable against the transferor Native Corporation, and valid obligations arising under section 1606(i) of this title as well as claims with respect to a

conveyance in violation of a valid contract, judgment, lien, or other obligation shall also be enforceable against the transferor corporation.

(5) Except as provided in paragraphs (1), (2), (3), and (4), once a Native Corporation has made, pursuant to subsection (a) of this section, a conveyance to a Settlement Trust that does not--

(A) render it--

(i) unable to satisfy claims based upon paragraph (1), (2), or (3); or

(ii) insolvent; or

(B) occur when the Native Corporation is insolvent;

the assets so conveyed to the Settlement Trust shall not be subject to attachment, distraint, or sale on execution of judgment or other process or order of any court, except with respect to the lawful debts or obligations of the Settlement Trust.

(6) No transferee Settlement Trust shall make a distribution or conveyance of assets (including cash, stock, or beneficial interests) that would render it unable to satisfy a claim made pursuant to paragraph (1), (2), or (3). A distribution or conveyance made in violation of this paragraph shall be void ab initio and shall not be given effect by any court.

(7) Except where otherwise expressly provided, no provision of this section shall be construed to require shareholder approval of an action where shareholder approval would not be required under the laws of the State.

* * *

§ 1633. Administrative provisions

(a) Limitations concerning easements

With respect to lands conveyed to Native Corporations or Native Groups the Secretary shall reserve only those easements which are described in section 17(b)(1) of the Alaska Native Claims Settlement Act [43 U.S.C. 1616(b)(1)] and shall be guided by the following principles:

(1) all easements should be designed so as to minimize their impact on Native life styles, and on subsistence uses; and

(2) each easement should be specifically located and described and should include only such areas as are necessary for the purpose or purposes for which the easement is reserved.

(b) Acquisition of future easements

Whenever, after a conveyance has been made by this Act or under the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.], the Secretary determines that an easement not reserved at the time of conveyance or by operation of subsection (a) of this section is required for any purpose specified in section 17(b)(1) of the Alaska Native Claims Settlement Act [43 U.S.C. 1616(b)(1)], he is authorized to acquire such easement by purchase or otherwise. The acquisition of such an easement shall be deemed a public purpose for which the Secretary may exercise his exchange authority pursuant to section 22(f) of the Alaska Native Claims Settlement Act [43 U.S.C. 1621(f)].

* * *

§ 1636. Alaska land bank

(a) Establishment; agreements

(1) In order to enhance the quantity and quality of Alaska's renewable resources and to facilitate the coordinated management and protection of Federal, State, and Native and other private lands, there is hereby established the Alaska Land Bank Program. Any private landowner is authorized as provided in this section to enter into a written agreement with the Secretary if his lands adjoin, or his use of such lands would directly affect, Federal land, Federal and State land, or State land if the State is not participating in the program. Any private landowner described in subsection (d)(1) of this section whose lands do not adjoin, or whose use of such lands would not directly affect either Federal or State lands also is entitled to enter into an agreement with the Secretary. Any private landowner whose lands adjoin, or whose use of such lands would directly affect, only State, or State and private lands, is authorized as provided in this section to enter into an agreement with the State of Alaska if the State is participating in the program. If the Secretary is the contracting party with the private landowner, he shall afford the State an opportunity to participate in negotiations and become a party to the agreement. An agreement may include all or part of the lands of any private landowner: *Provided*, That no lands shall be included in the agreement unless the Secretary, or the State, determines that the purposes of the program will be promoted by their inclusion.

(2) If a private landowner consents to the inclusion in an agreement of the stipulations provided in subsections (b)(1), (b)(2), (b)(4), (b)(5), and (b)(7) of this section, and if such owner does not insist on any additional terms which are

unacceptable to the Secretary or the State, as appropriate, the owner shall be entitled to enter into an agreement pursuant to this section. If an agreement is not executed within one hundred and twenty days of the date on which a private landowner communicates in writing his consent to the stipulations referred to in the preceding sentence, the appropriate Secretary or State agency head shall execute an agreement. Upon such execution, the private owner shall receive the benefits provided in subsection (c) hereof.

(3) No agreement under this section shall be construed as affecting any land, or any right or interest in land, of any owner not a party to such agreement.

(b) Terms of agreement

Each agreement referred to in subsection (a) of this section shall have an initial term of ten years, with provisions, if any, for renewal for additional periods of five years. Such agreement shall contain the following terms:

(1) The landowner shall not alienate, transfer, assign, mortgage, or pledge the lands subject to the agreement except as provided in section 14(c) of the Alaska Native Claims Settlement Act [43 U.S.C. 1613(c)], or permit development or improvement on such lands except as provided in the agreement. For the purposes of this section only, each agreement entered into with a landowner described in subsection (d)(1) of this section shall constitute a restriction against alienation imposed by the United States upon the lands subject to the agreement.

(2) Lands subject to the agreement shall be managed by the owner in a manner compatible with the management plan, if any, for the adjoining Federal or State lands, and with the requirements of this subsection. If lands subject to the agreement do not adjoin either Federal or State lands, they shall

be managed in a manner compatible with the management plan, if any, of Federal or State lands which would be directly affected by the use of such private lands. If no such plan has been adopted, or if the use of such private lands would not directly affect either Federal or State lands, the owner shall manage such lands in accordance with the provisions in paragraph (1) of this subsection. Except as provided in (3) of this subsection, nothing in this section or the management plan of any Federal or State agency shall be construed to require a private landowner to grant public access on or across his lands.

(3) If the surface landowner so consents, such lands may be made available for local or other recreational use: *Provided*, That the refusal of a private landowner to permit the uses referred to in this subsection shall not be grounds for the refusal of the Secretary or the State to enter into an agreement with the landowner under this section.

(4) Appropriate Federal and/or State agency heads shall have reasonable access to such privately owned land for purposes relating to the administration of the adjoining Federal or State lands, and to carry out their obligations under the agreement.

(5) Reasonable access to such land by officers of the State shall be permitted for purposes of conserving fish and wildlife.

(6) Those services or other consideration which the appropriate Secretary or the State shall provide to the owner pursuant to subsection (c)(1) of this section shall be set forth.

(7) All or part of the lands subject to the agreement may be withdrawn from the Alaska land bank program not earlier than ninety days after the landowner--

(A) submits written notice thereof to the other parties which are signatory to the agreement; and

(B) pays all Federal, State and local property taxes and assessments which, during the particular term then in effect, would have been incurred except for the agreement, together with interest on such taxes and assessments in an amount to be

determined at the highest rate of interest charged with respect to delinquent property taxes by the Federal, State or local taxing authority, if any.

(8) The agreement may contain such additional terms, which are consistent with the provisions of this section, as seem desirable to the parties entering into the agreement: *Provided*, That the refusal of the landowner to agree to any additional terms shall not be grounds for the refusal of the Secretary or the State to enter into an agreement with the landowner under this section.

(c) Benefits to private landowners

(1) In addition to any requirement of applicable law, the appropriate Secretary is authorized to provide technical and other assistance with respect to fire control, trespass control, resource and land use planning, and the protection, maintenance, and enhancement of any special values of the land subject to the agreement, all with or without reimbursement as agreed upon by the parties, so long as the landowner is in compliance with the agreement.

(2) The provision of section 21(e) of the Alaska Native Claims Settlement Act [43 U.S.C. 1620(e)] shall apply to all lands which are subject to an agreement made pursuant to this section so long as the parties to the agreement are in compliance therewith.

(d) Automatic protections for lands conveyed pursuant to the Alaska Native Claims Settlement Act

(1)(A) Notwithstanding any other provision of law or doctrine of equity, all land and interests in land in Alaska conveyed by the Federal Government pursuant to the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.] to a

Native individual or Native Corporation or subsequently reconveyed by a Native Corporation pursuant to section 39 of that Act [43 U.S.C. 1629e] to a Settlement Trust shall be exempt, so long as such land and interests are not developed or leased or sold to third parties from--

(i) adverse possession and similar claims based upon estoppel;

(ii) real property taxes by any governmental entity;

(iii) judgments resulting from a claim based upon or arising under--

(I) Title 11 or any successor statute,

(II) other insolvency or moratorium laws, or

(III) other laws generally affecting creditors' rights;

(iv) judgments in any action at law or in equity to recover sums owed or penalties incurred by a Native Corporation or Settlement Trust or any employee, officer, director, or shareholder of such corporation or trust, unless this exemption is contractually waived prior to the commencement of such action; and

(v) involuntary distributions or conveyances related to the involuntary dissolution of a Native Corporation or Settlement Trust.

(B) Except as otherwise provided specifically provided, the exemptions described in subparagraph (A) shall apply to any claim or judgment existing on or arising after February 3, 1988.

(2) Definitions

(A) For purposes of this subsection, the term--

(i) "Developed" means a purposeful modification of land, or an interest in land, from its original state that effectuates a condition of gainful and productive present use without further substantial modification. Surveying, construction of roads, providing utilities, or other similar actions, which are normally

considered to be component parts of the development process but do not create the condition described in the preceding sentence, shall not constitute a developed state within the meaning of this clause. In order to terminate the exemptions listed in paragraph (1), land, or an interest in land, must be developed for purposes other than exploration, and the exemptions will be terminated only with respect to the smallest practicable tract actually used in the developed state;

(ii) "Exploration" means the examination and investigation of undeveloped land to determine the existence of subsurface nonrenewable resources; and

(iii) "Leased" means subjected to a grant of primary possession entered into for a gainful purpose with a determinable fee remaining in the hands of the grantor. With respect to a lease that conveys rights of exploration and development, the exemptions listed in paragraph (1) shall continue with respect to that portion of the leased tract that is used solely for the purposes of exploration.

(B) For purposes of this subsection--

(i) land shall not be considered developed solely as a result of--

(I) the construction, installation, or placement upon such land of any structure, fixture, device, or other improvement intended to enable, assist, or otherwise further subsistence uses or other customary or traditional uses of such land, or

(II) the receipt of fees related to hunting, fishing, and guiding activities conducted on such land;

(ii) land upon which timber resources are being harvested shall be considered developed only during the period of such harvest and only to the extent that such land is integrally related to the timber harvesting operation; and

(iii) land subdivided by a State or local platting authority on the basis of a subdivision plat submitted by the holder of the land or its agent, shall be considered developed on the date an

approved subdivision plat is recorded by such holder or agent unless the subdivided property is a remainder parcel.

(3) Action by a trustee

(A) Except as provided in this paragraph and in section 14(c)(3) of the Alaska Native Claims Settlement Act [43 U.S.C. 1613(c)(3)] no trustee, receiver, or custodian vested pursuant to applicable Federal or State law with a right, title, or interest of a Native individual or Native Corporation shall--

(i) assign or lease to a third party,

(ii) commence development or use of, or

(iii) convey to a third party,

any right, title, or interest in any land, or interests in land, subject to the exemptions described in paragraph (1).

(B) The prohibitions of subparagraph (A) shall not apply--

(i) when the actions of such trustee, receiver, or custodian are for purposes of exploration or pursuant to a judgment in law or in equity (or arbitration award) arising out of any claim made pursuant to section 7(i) [43 U.S.C. 1606(i)] or section 14(c) [43 U.S.C. 1613(c)] of the Alaska Native Claims Settlement Act; or

(ii) to any land, or interest in land, which has been--

(I) developed or leased prior to the vesting of the trustee, receiver, or custodian with the right, title, or interest of the Native Corporation; or

(II) expressly pledged as security for any loan or expressly committed to any commercial transaction in a valid agreement.

(4) Exclusions, reattachment of exemptions

(A) The exemptions listed in paragraph (1) shall not apply to

any land, or interest in land, which is--

(i) developed or leased or sold to a third party;

(ii) held by a Native Corporation in which neither--

(I) the Settlement Common Stock of the corporation,

(II) the Settlement Common Stock of the corporation and other stock of the corporation held by holders of Settlement Common Stock, nor

(III) the Settlement Common Stock of the corporation and other stock of the corporation held by holders of Settlement Common Stock and by Natives and descendants of Natives,

represents a majority of either the total equity of the corporation or the total voting power of the corporation for the purposes of electing directors; or

(iii) held by a Settlement Trust with respect to which any of the conditions set forth in section 39 of the Alaska Native Claims Settlement Act [43 U.S.C. 1629e] have been violated.

(B) The exemptions described in clauses (iii), (iv), and (v) of paragraph (1)(A) shall not apply to any land, or interest in land--

(i) to the extent that such land or interest is expressly pledged as security for any loan or expressly committed to any commercial transaction in a valid agreement, and

(ii) to the extent necessary to enforce a judgment in any action at law or in equity (or any arbitration award) arising out of any claim made pursuant to section 7(i) [43 U.S.C. 1606(i)] or section 14(c) [43 U.S.C. 1613(c)] of the Alaska Native Claims Settlement Act.

(C) If the exemptions listed in paragraph (1) are terminated with respect to land, or an interest in land, as a result of development (or a lease to a third party), and such land, or interest in land, subsequently reverts to an undeveloped state (or the third-party lease is terminated), then the exemptions shall again apply to such land, or interest in land, in accordance

with the provisions of this subsection.

* * *

§ 1641. Conveyances to Village Corporations

(a) Optional procedure

The provisions of this section shall be applicable only to the conveyance of Federal lands described herein to a Native Corporation which within one hundred and eighty days after December 2, 1980, or the date of eligibility determination, whichever is later, files a document with the Secretary setting forth its election to receive conveyance pursuant to this section.

(b) "Core" townships, etc.

(1)(A) Except to the extent that conveyance of a surface estate would be inconsistent with section 12(a), 14(a), 14(b), or 22(l) of the Alaska Native Claims Settlement Act [43 U.S.C. 1611(a), 1613(a), 1613(b), or 1621(l)], subject to valid existing rights and section 1633(a) of this title, there is hereby conveyed to and vested in each Village Corporation for a Native Village which is determined by the Secretary to be eligible for land under section 11 or 16 of the Alaska Native Claims Settlement Act [43 U.S.C. 1610 or 1615], and which did not elect to acquire a former reserve under section 19(b) of such Act [43 U.S.C. 1618(b)], all of the right, title, and interest of the United States in and to the surface estate in the public lands, as defined in such Act [43 U.S.C. 1601 et seq.], in the township or townships withdrawn pursuant to section 11(a)(1) or 16(a) of such Act [43 U.S.C. 1610 (a)(1) or 1615(a)] in which all or any part of such Village is located. As used in this paragraph the term "Native Village" has the same meaning such term has in

section 3(c) of the Alaska Native Claims Settlement Act [43 U.S.C. 1602(c)].

* * *

(2) Except to the extent that conveyance of a surface estate would be inconsistent with section 12(a), 14(a), or 22(l) of the Alaska Native Claims Settlement Act [43 U.S.C. 1611(a), 1613(a), or 1621(l)], subject to valid existing rights and section 1633(a) of this title, there is hereby conveyed to and vested in each Village Corporation for a Native Village which is determined by the Secretary to be eligible for land under section 11 of such Act [43 U.S.C. 1610], and which did not elect to acquire a former reserve under section 19(b) of such Act [43 U.S.C. 1618(b)], all of the right, title, and interest of the United States in and to the surface estate in the township or townships withdrawn pursuant to section 11(a)(2) of such Act [43 U.S.C. 1610(a)(2)] in which all or any part of such village is located: *Provided*, That any such land reserved to or selected by the State of Alaska under the Acts of March 4, 1915 (38 Stat. 1214), as amended, January 21, 1929 (45 Stat. 1091), as amended, or July 28, 1956 (70 Stat. 709), and lands selected by the State which have been tentatively approved to the State under section 6(g) of the Alaska Statehood Act and as to which the State, prior to December 18, 1971, had conditionally granted title to, or contracts to purchase, the surface estate to third parties, including cities and boroughs within the State, and such reservations, selections, grants, and contracts had not expired or been relinquished or revoked by December 2, 1980, shall not be conveyed by operation of this paragraph: *And provided further*, That the provisions of subparagraph (1)(B) of this subsection shall apply to the conveyances under this paragraph.

(3) Subject to valid existing rights and section 1633(a) of this

title, there is hereby conveyed to and vested in each Village Corporation which, by December 2, 1980, is determined by the Secretary to be eligible under the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.] to, and has elected to, acquire title to any estate pursuant to section 19(b) of the Alaska Native Claims Settlement Act [43 U.S.C. 1618(b)], all of the right, title, and interest of the United States in and to the estates in a reserve, as such reserve existed on December 18, 1971, which was set aside for the use or benefit of the stockholders or members of such Corporation before December 18, 1971. Nothing in this paragraph shall apply to the Village Corporation for the Native village of Klukwan, which Corporation shall receive those rights granted to it by the Act of January 2, 1976 (Public Law 94-204) as amended by the Act of October 4, 1976 (Public Law 94-456).

* * *

§ 1642. Land conveyances

Solely for the purpose of bringing claims that arise from the discharge of oil, the Congress confirms that all right, title, and interest of the United States in and to the lands validly selected pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) by Alaska Native corporations are deemed to have vested in the respective corporations as of March 23, 1989. This section shall take effect with respect to each Alaska Native corporation only upon its irrevocable election to accept an interim conveyance of such land and notice of such election has been formally transmitted to the Secretary of the Interior.

Alaska Native Claims Settlement Act Amendments of 1987 (uncodified)
Pub.L. 100-241, §§ 2, 17, Feb. 3, 1988, 101 Stat. 1788, 1814:

Sec. 2. The Congress finds and declares that--

(1) the Alaska Native Claims Settlement Act [this chapter] was enacted in 1971 to achieve a fair and just settlement of all aboriginal land and hunting and fishing claims by Natives and Native groups of Alaska with maximum participation by Natives in decisions affecting their rights and property;

(2) the settlement enabled Natives to participate in the subsequent expansion of Alaska's economy, encouraged efforts to address serious health and welfare problems in Native villages, and sparked a resurgence of interest in the cultural heritage of the Native peoples of Alaska;

(3) despite these achievements and Congress's desire that the settlement be accomplished rapidly without litigation and in conformity with the real economic and social needs of Natives, the complexity of the land conveyance process and frequent and costly litigation have delayed implementation of the settlement and diminished its value;

(4) Natives have differing opinions as to whether the Native Corporation, as originally structured by the Alaska Native Claims Settlement Act [this chapter], is well adapted to the reality of life in Native villages and to the continuation of traditional Native cultural values;

(5) to ensure the continued success of the settlement and to guarantee Natives continued participation in decisions affecting their rights and property, the Alaska Native Claims Settlement Act [this chapter], must be amended to enable the shareholders of each Native Corporation to structure the further implementation of the settlement in light of their particular

circumstances and needs;

(6) among other things, the shareholders of each Native Corporation must be permitted to decide--

(A) when restrictions on alienation of stock issued as part of the settlement should be terminated, and

(B) whether Natives born after December 18, 1971, should participate in the settlement;

(7) by granting the shareholders of each Native Corporation options to structure the further implementation of the settlement, Congress is not expressing an opinion on the manner in which such shareholders choose to balance individual rights and communal rights;

(8) no provision of this Act [see Short title of 1988 Amendment note under this section] shall--

(A) unless specifically provided, constitute a repeal or modification, implied or otherwise, of any provision of the Alaska Native Claims Settlement Act [this chapter]; or

(B) confer on, or deny to, any Native organization any degree of sovereign governmental authority over lands (including management, or regulation of the taking, of fish and wildlife) or persons in Alaska; and "(9) the Alaska Native Claims Settlement Act [this chapter] and this Act [see Short Title of 1988 Amendment note under this section] are Indian legislation enacted by Congress pursuant to its plenary authority under the Constitution of the United States to regulate Indian affairs.

* * *

Sec. 17. (a) No provision of this Act (the Alaska Native Claims Settlement Act Amendments of 1987) [see Short Title of 1988 Amendment note under this section], exercise of authority pursuant to this Act, or change made by, or pursuant

to, this Act in the status of land shall be construed to validate or invalidate or in any way affect--

"(1) any assertion that a Native organization (including a federally recognized tribe, traditional Native council, or Native council organized pursuant to the Act of June 18, 1934 (48 Stat. 1987), as amended) [section 461 et seq. of Title 25, Indians] has or does not have governmental authority over lands (including management of, or regulation of the taking of, fish and wildlife) or persons within the boundaries of the State of Alaska, or

"(2) any assertion that Indian country (as defined by 18 U.S.C. 1151 [section 1151 of Title 18, Crimes and Criminal Procedure] or any other authority) exists or does not exist within the boundaries of the State of Alaska.

"(b) Nothing in the Alaska Native Claims Settlement Act Amendments of 1987 (or any amendment made thereby) shall be construed--

"(1) to diminish or enlarge the ability of the Federal Government to assess, collect, or otherwise enforce any Federal tax, or

"(2) to affect, for Federal tax purposes, the valuation of any stock issued by a Native Corporation."

Amendments to Alaska Native Claims Settlement Act of 1971

Pub. L. No. 93-153, § 407(a)(b), 87 Stat. 591 (1973);

Pub. L. No. 94-204, 89 Stat. 1145 (1976);

Pub. L. No. 94-273, § 38, 90 Stat. 380 (1976);

Pub. L. No. 94-456, §§ 1, 3, 4, 90 Stat. 1934 (1976);

Pub. L. No. 95-178, 91 Stat. 1369 (1977);

Pub. L. No. 95-600, § 541, 92 Stat. 2887 (1978);

Pub. L. No. 96-55, § 2, 93 Stat. 386 (1979);

Pub. L. No. 96-311, 94 Stat. 947 (1980);

Pub. L. No. 96-487, §§ 901-911, 1401-1437, 94 Stat. 2430, 2491 (1980);

Pub. L. No. 97-468, § 606(d), 96 Stat. 2566 (1983);

Pub. L. No. 99-96, 99 Stat. 460 (1985);

Pub. L. No. 99-258, 100 Stat. 42 (1986);

Pub. L. No. 99-396, § 22, 100 Stat. 846 (1986);

Pub L. No. 99-500, § 101(h), 100 Stat. 1783-286 (1986);

Pub. L. No. 99-591, § 101(h), 100 Stat. 3341-287 (1986);

Pub. L. No. 99-644, 100 Stat 3581 (1986);

Pub. L. No. 100-202, § 101(j), 101 Stat. 1329-318 (1987);

Pub. L. No. 100-241, 101 Stat. 1788 (1988);

Pub. L. No. 100-395, 102 Stat. 979 (1988);

Pub. L. No. 100-581, § 218, 102 Stat. 2942 (1988);

Pub. L. No. 101-378, § 301, 104 Stat. 471 (1990);

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Pub. L. No. 102-201, § 301, 105 Stat. 1633 (1991);

Pub. L. No. 102-415, 106 Stat. 2112 (1992);

Pub. L. No. 103-204, § 32(b), 107 Stat. 2413 (1993);

Pub. L. No. 103-437, § 16(a)(5), 108 Stat. 4594 (1994);

Pub. L. No. 104-10, 109 Stat. 155 (1995);

Pub. L. No. 104-42, 109 Stat. 353 (1995).

Federal statutes dealing with Alaska Native villages as possessed of territorial jurisdiction in their communities

7 U.S.C. § 5930 (repealed) & note (*as amended by* Pub. L. 102-237, sec. 932(3), 105 Stat. 1906) -- Providing Alaska Native villages with the same rights as other Indian tribes to obtain grants to establish education programs to promote more efficient subsistence farming practices "on Indian reservations and tribal jurisdictions" under the Agriculture Extension Service's subsistence farming education and grant program [including Settlement Act lands by reference to 25 U.S.C. § 1452(d)];

12 U.S.C. §§ 1701, 4702(11)(12), -- Defining "Indian reservation" to include Settlement Act lands and other areas of "Indian country" (by reference to 25 U.S.C. § 1903 (10)) for purposes of the Community Development Financial Institutions Act;

13 U.S.C. §§ 181, 184(1) -- Treating "Alaska Native village" as a "local unit of general purpose government" under the Census Act;

16 U.S.C. §§ 470, 470a(d)(2), 470w(4), 470w(14) -- Providing assistance in conservation of historic sites, buildings, objects and antiquities; authorizing Indian tribes, including any "native village," to assume the functions of a State Historic Preservation Officer with respect to "tribal lands," including "dependent Indian communities";

16 U.S.C. §§ 1721(b)(2), 1722(5)-(7), 1723(d), 1729(a)(1) -- Treating recognized Alaska Native villages the same as Indian

tribes and treating Settlement Act lands the same as reservation, allotment or dependent Indian community Indian country lands for purposes of participating in natural and cultural conservation projects authorized by the Public Lands Corps Act of 1993; providing for tribal approval of all public land corps conservation projects occurring on such "Indian lands;" and eliminating cost-sharing requirements for approval of projects carried out on Indian lands;

16 U.S.C. §§ 4301, 4302(3)-(4), 4305, 4305(d) -- Protecting caves located on lands held by Indian tribes, including Alaska Native villages; and authorizing the Secretary of the Interior to delegate federal permitting authority to Indian tribes and Alaska Native villages to regulate activities in caves located within Indian lands under the Federal Cave Resources Protection Act of 1988;

20 U.S.C. §§ 1101(b), 1106b(c)(7) -- In selecting members to participate in the joint State-Federal Teacher Corps program, special consideration is given to individuals who "intend to teach on Indian reservations or in Alaska Native villages";

20 U.S.C. §§ 3282, 3292 -- Making certain bilingual education programs available to recognized Alaska Native tribes where local schools in their communities are operated predominantly for Alaska Native children.

20 U.S.C. §§ 7701, 7704, 7713 -- Defining "Indian lands" in connection with the payment of federal impact aid to local educational agencies to include lands conveyed under ANCSA to a Native individual, Native group, village or regional corporation; lands held in trust by the United States for individual Indians or Indian tribes; and land held by individual Indians or Indian tribes subject to restrictions or alienation

imposed by the United States;

23 U.S.C. § 101 -- Placing Alaska Native villages on the same footing as Indian reservations with respect to federal highway funding under the National Highway System Designation Act of 1995;

25 U.S.C. §§ 1301(1), (2), (4) -- Acknowledging that the "power of self-government" of any recognized Indian tribe "means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians [in Indian country]," with no exclusion for Alaska.

25 U.S.C. §§ 1451, 1452(c)-(d), 1466, 1481, 1495 -- Authorizing tribes, including recognized Alaska Native villages, access to revolving loan fund, loan guaranty and loan insurance programs established under the Indian Financing Act of 1974, and providing that title to land purchased with loan funds on a "reservation" (including Settlement Act lands) "may be taken in trust";

25 U.S.C. § 1644(a) -- Authorizing the Secretary of the Interior to make grants or enter into contracts to assist "tribal organizations" in establishing health care assistance programs "on or near Federal Indian reservations and trust areas and in or near Alaska Native villages";

25 U.S.C. §§ 2402, 2403(3) -- Including recognized Alaska Native villages among tribes benefitting from the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986 (including tribal law enforcement training, 25 U.S.C. §§ 2441-2455) enacted in furtherance of the Federal government's "historical relationship and unique legal and moral responsibility to Indian tribes" and the treaty, statutory and

historical obligation to assist the Indian tribes in meeting the health and social needs of their members," 25 U.S.C. §§ 2401(1)-(2);

25 U.S.C. § 2801(4)-(5) -- Mandating BIA assistance for all tribal law enforcement services in "Indian country" with no exclusion for Alaska;

25 U.S.C. §§ 2901, 2902(5)-(8) -- Including within the scope of tribes and reservations recognized Alaska Native villages and Settlement Act lands (by reference to 25 U.S.C. § 1452) in connection with the Native American Languages Act;

25 U.S.C. § 3001(7)-(15) -- Including within the scope of tribes and tribal lands recognized Alaska Native villages and "dependent Indian communities" in connection with the protection of Native American human remains and objects situated on tribal lands (25 U.S.C. § 3002) and the repatriation of Native American human remains and funerary objects (25 U.S.C. § 3005);

25 U.S.C. §§ 3102, 3112 -- Authorizing Self-Determination Act contracts with recognized Alaska Native villages (by reference to 25 U.S.C. § 450b(e)) to carry out the Secretary's duty to "establish a program of technical assistance . . . to promote the sustained yield management" of forest resources belonging to Settlement Act corporations, in consultation with those corporations;

25 U.S.C. §§ 3201(b), 3202(9), 3208 -- Treating Settlement Act lands the same as Indian reservation lands in connection with tribal child abuse treatment grant programs funded under the Indian Child Protection and Family Violence Prevention Act;

25 U.S.C. §§ 3601, 3602(3) -- Recognizing the federal trust responsibility to each tribal government, including "any Alaska Native entity which administers justice under its inherent authority or the authority of the United States," and establishing a regime of federal support for those systems under the Indian Tribal Justice Act;

25 U.S.C. §§ 3702, 3703(9)--(10) -- Including Alaska Native villages in the programs of the American Indian Agricultural Resources Management Act with respect to qualifying "Indian land;"

25 U.S.C. §§ 3901, 3902(3)-(6) -- Treating Settlement Act lands and "any Alaska Native village" identically to Indian country lands of other recognized tribes as part of an initiative to inventory and close open dumps and to address solid waste disposal needs on such lands;

26 U.S.C. §§ 45A(c)(6)-(7), 168(j)(6) -- Establishing an Indian employment credit for wages paid to tribal members where "substantially all of the services performed" are within any Indian reservation and the employee resides on or near the reservation, and defining "reservation" to include Settlement Act lands (by reference in 26 U.S.C. § 168(j)(6) to 25 U.S.C. § 1452(d));

26 U.S.C. § 4225 -- Providing a federal tax exemption for "native Indian handicraft" manufactured or produced . . . on Indian reservations . . . or by Indians under the jurisdiction of the United States Government in Alaska";

29 U.S.C. §§ 720(a), 750(c) -- Making handicapped Native Americans residing on a "reservation," including on Settlement Act lands, eligible beneficiaries for special vocational rehabilitation grant programs administered by Alaska Native villages and other Indian tribes;

29 U.S.C. §§ 1782, 1782a(b), 1782h(1)(C) -- Treating Alaska Native village[s] and Indian reservations the same in connection with Youth Fair Chance Program grants;

29 U.S.C. § 1783(g)(2) -- Treating "Alaska Native village[s]" and Indian reservations identically to states in connection with the Microenterprise Grants Program;

29 U.S.C. § 1784b(1) -- Treating communities operating on Indian reservations or "Alaska Native village[s]" as "unit[s] of general local government" eligible to receive and administer emergency funding under the Disaster Relief Employment Assistance program;

42 U.S.C. § 682(i) (repealed) -- Authorizing Alaska Native villages (by reference to 25 U.S.C. § 450b(e)) to administer job opportunities and basic skills training programs for Alaska Natives residing in "the boundaries . . . of the geographic region, established pursuant to [43 U.S.C. § 1606(a) of the 1971 Settlement Act] within which the Alaska Native organization is located (without regard to the ownership of the land within the boundaries);"

42 U.S.C. §§ 1437a(b)(9)-(12), 1437aa (repealed), 1437aaa -- Including members of any "tribe, band, pueblo, group, community, or nation of Indians or Alaska Natives" in HUD low-income housing program, and including Indian housing

authorities established either under tribal or state law to operate HUD's low income material help home ownership programs within an "Indian area" in the same manner as on a reservation;

42 U.S.C. §§ 1471(a)(b)(6) -- Defining "Indian tribe" to include Alaska Native villages in connection with financial assistance for farm housing;

42 U.S.C. §§ 1973aa-1a(a)(b)(2)(A), (3)(C) -- Defining "Indian reservation" to include "American Indian or Alaska Native area[s]" as those terms are defined by the Census Bureau in the 1990 census for purposes of enforcing federal bilingual election requirements;[1]

42 U.S.C. §§ 3001, 3002(6)-(7), 3022(2)(B), 3057, 3058aa -- Authorizing Alaska Native villages to operate Health and Human Services programs benefitting "older Americans" residing in their communities on the same basis as any other Indian tribe, and to be treated as a "unit of general purpose local government;"

42 U.S.C. §§ 3796dd(a), (d), 3796dd-8 -- Including "Indian tribal governments" of "an Alaska Native village" among tribes eligible to administer "cops on the beat" law enforcement grants, on the same basis as states and other units of local government;

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[1] In the absence of "legally designated boundaries" for all Native villages, the Bureau of Census has "delineate[d] boundaries that encompass the settled area associated with each ANV [Alaska Native Village]" that is "recognized pursuant to [the Settlement Act]," doing so in cooperation with "knowledgeable officials." 1990 CENSUS REPORT at A-2. *See also, id.* at 22-24 (Table 13), 25-27 (Table 14), 169-192 (Table 80) and 193-215 (Table 81) (reporting census data analyses for each Alaska Native village).

42 U.S.C. §§ 3796gg, 3796gg-2(3) -- Including Indian tribal governments of "any Alaska Native village" to administer grants to combat violence against women, on the same basis as states and other units of local government;

42 U.S.C. § 4368b -- Including "any Alaska Native village" among tribes and intertribal consortia eligible to receive EPA grants to support and build their capacities to administer environmental regulation programs on "Indian lands;"

42 U.S.C. § 5061(5) -- Including recognized Alaska Native villages as "public agencies or organizations" authorized to carry out programs in their communities under the Domestic Volunteer Service Act;

42 U.S.C. §§ 5121, 5122(6) -- Including any Alaska Native village as a "local government" under the Disaster Relief Act;

42 U.S.C. §§ 5301, 5302(a)(17), 5306 -- Including reorganized Alaska Native villages as tribes eligible to receive Housing and Urban Development Act grants for a broad range of purposes, including *inter alia* the acquisition of real property, construction of public works, code enforcement in deteriorating areas, various housing programs, and the provision of public services "including but not limited to those concerned with employment, crime prevention, child care, health, drug abuse, education, energy conservation, welfare or recreation needs," section 5305(a), and in section 5318(n) making a recognized tribe "located . . . in an Alaska Native village" eligible to receive urban development action grants to relieve "severe economic distress to help stimulate economic development;"

42 U.S.C. §§ 6701, 6702, 6707(a)(1), 6707(h)(2)(B) -- Alaska Native villages, like other tribes, eligible for direct grants for

construction, renovation or improvement of local public works projects;

42 U.S.C. §§ 6721, 6722, 6723(c)(3) -- Providing that "the recognized governing body of an Indian tribe or Alaskan Native village which performs substantial governmental functions" is eligible for financial assistance to coordinate budget-related actions with Federal efforts to stimulate economic recovery;

42 U.S.C. §§ 8801, 8802(12), (17) -- Providing assistance in the development of biomass energy and alcohol fuels available to recognized tribes, including Alaska Native villages; and

42 U.S.C. §§ 10101, 10121 -- Indian tribes, including Alaska Native villages, are (like states) entitled to participate and consult with federal authorities on the handling and disposal of nuclear waste if their lands are "affected" by being proposed as a site for nuclear waste disposal;

42 U.S.C. §§ 11471, 11472 -- Set-asides for the job training demonstration program and the emergency community services homeless program available to recognized Indian tribes, including any Alaska Native village.

42 U.S.C. § 13791 -- Authorizing the Attorney General to award grants to "an Alaska Native village" for youth services and supervision programs in "Indian country" to provide extra-curricular, academic and supervised sports programs in poverty areas and areas of significant juvenile delinquency;

42 U.S.C. § 13801 -- Authorizing the Attorney General to award grants to an "Alaska Native village" for delinquent and at-risk youth residential services program;

42 U.S.C. §§ 13861, 13868 -- Authorizing the Attorney General to award grants to "an Alaska Native village" to "support[ ] the creation or expansion of community-based justice programs" specified in section 13862;

42 U.S.C. § 13911 -- Authorizing the Attorney General to develop guidelines for Indian tribal correctional institutions (including those of "an Alaska Native village") to address inmate tuberculosis (TB), and to award tribal grants for inmate TB programs;

42 U.S.C. § 13971 -- Authorizing the Attorney General to award grants to "an Alaska Native village" to coordinate among law enforcement officers, prosecutors and advocacy groups the investigation of domestic violence and child abuse (as well as treatment and prevention initiatives);

42 U.S.C. § 14151 -- Authorizing the Attorney General to award grants to "an Alaska Native village" to "improve[ ] criminal justice agency efficiency through computerized automation and technological improvements," and to expand and improve investigative and managerial training courses for tribal law enforcement agencies.

Additional federal statutes dealing with Alaska Native village tribes on an equal basis with other federally recognized tribes

5 U.S.C. § 3371(2)(C) -- Treating Alaska Native villages the same as other Indian tribes regarding the assignment of federal personnel to work for tribal governments under the Intergovernmental Personnel Act;

7 U.S.C. §§ 2279(a)(1) and (2)(B) -- Making Alaska Native cooperative colleges eligible to receive assistance grants and contracts to further the goals of the Socially Disadvantaged Farmers and Ranchers program;

12 U.S.C. § 1715z-13(a)(1), (i) -- Authorizing special federal mortgage insurance for mortgages executed by Alaska Native tribes with respect to property situated on ANCSA land or other Alaska Native acquired lands;

15 U.S.C. §§ 631, 637(a)(13) -- Making the tribal minority contractor provisions of the Small Business Act available to Alaska Native villages;

16 U.S.C. §§ 470aa, 470bb -- Programs for archaeological resources protection;

16 U.S.C. §§ 1362(23), 1386(d), 1387(f)(6)(C) -- Requiring the Secretary of Commerce to include representatives of Alaska Native organizations, along with representatives of other Indian tribes and state governors, on scientific review panels and "take reduction" committees responsible for monitoring and protecting the marine mammal populations within their respective regions under the Marine Mammal Protection Act of

1994;

18 U.S.C. § 1159(c)(3) -- Treating recognized Alaska Native villages the same as other Indian tribes with respect to federal criminal penalties imposed for misrepresentation of Indian produced goods and products.

20 U.S.C. §§ 80q(6)-(8), 80q-9(a)-(d), 80q-10(a)-(c), 80q-12(a), 80q-13(a), 80q-14(8) -- Acknowledging the longstanding concern of Indian tribes, including recognized Alaska Native villages, over the mistreatment of Indian and Alaska Native human remains and funerary objects, providing for the inventory, identification and return of such remains and objects in consultation with tribal government officials under the direction of a special review committee consisting of tribal representatives; and authorizing the Secretary of the Interior to award grants to Indian tribes, including Alaska Native villages to assist them in carrying out agreements for the return of human remains and artifacts and for the improvement of tribal museums, cultural centers and archives;

20 U.S.C. §§ 351a, 351c -- Making recognized Alaska Native villages and other Indian tribes eligible, on the same basis as state governments, to receive federal funding to improve and expand library services to tribal areas without such services;

20 U.S.C. §§ 1400, 1401, 1411(f), 1484 -- Requiring that Indian tribes, including recognized Alaska Native villages, participate in the decision-making process regarding federal programs and funding for the education of disabled Native American children;

20 U.S.C.A. §§ 6102, 6103 -- Including Alaska Native villages among federally recognized Indian tribes eligible to participate

in the school-to-work opportunities, bilingual education, and related language programs;

20 U.S.C. §§ 4401, 4402(5) -- Including Alaska Native villages with other Indian tribes regarding tribal involvement in the Institute of American Indian and Alaska Native Culture and Arts Development;

20 U.S.C. §§ 5501, 5502(8) -- Defining "tribal education agency" to mean schools or colleges controlled by Indian tribes, including Alaska Native villages, and making them eligible to participate in programs under the National Environmental Education Act;

20 U.S.C. §§ 5801, 5802(a)(1)-(3), 5886(g)(2) -- Requiring the involvement of tribal government officials, including officials representing Alaska Native villages, in the development of education goals and standards for American Indian and Alaska Native children under the Goals 2000: Educate American Act;

20 U.S.C.A. §§ 7402, 7404 -- Defining "Indian tribe" to include Alaska Native villages to carry out certain language education programs.

25 U.S.C. §§ 305a, 305e(d)(3)(A) -- Including recognized Alaska Native villages among tribes authorized to bring suit for misrepresentation of Indian produced goods;

25 U.S.C. §§ 450a, 450b(e) -- Including recognized Alaska Native villages among tribes eligible to operate federal Indian programs;

25 U.S.C. §§ 472, 472a(c)(1), (f)(1)(A) -- Authorizing the recognized governing body of any Alaska Native village to

waive the Indian preference laws applicable to positions within the Bureau of Indian Affairs and the Indian Health Service;

25 U.S.C. § 479 -- Authorizing "aboriginal peoples of Alaska" to reorganize their tribal governments under the Indian Reorganization Act;

25 U.S.C. §§ 1212, 1214 -- Reconfirming the government-to-government relationship between the United States and Alaska Native tribes;

25 U.S.C. §§ 1602, 1603 -- Including recognized Alaska Native villages among tribes benefitting from the Indian Health Care Improvement Act;

25 U.S.C. §§ 2001, 2026(14) -- Including "any Alaska Native village" among tribes participating in various BIA education programs;

25 U.S.C. §§ 2502, 2505, 2511(2) -- Authorizing a tribe, including "any Alaska Native village," to receive grants to help defray the expenses of operating "tribally controlled schools";

25 U.S.C. §§ 3501(2), 3502 -- Providing Alaska Native villages with the same rights as other Indian tribes to consult with federal officials and receive loans and program support to promote energy resource development on tribal lands under of the Indian Energy Resources Act;

25 U.S.C. § 4001(2), 4021 -- Including any Alaska Native village within the scope of the American Indian Trust Fund Management Reform Act regarding accountings of trust funds, and tribal management of trust fund programs.

29 U.S.C. §§ 701, 706 (21) -- Provision of vocational rehabilitation and other rehabilitation services under the Rehabilitation Act;

29 U.S.C. §§ 1671(a)-(b), 1671(c)(1)(A) -- Alaska Native village tribal participation in comprehensive training and employment programs established under the Job Training Partnership Act;

31 U.S.C. § 7501(9), (19) -- Defining, with respect to the single-audit requirement for state and local governments, "State" to include any Indian tribe, including any Alaska Native village;

33 U.S.C. §§ 2701(15), 2706(b)(4) -- Authorizing Alaska Native village tribes to serve as natural resource trustees in connection with oil spills affecting lands "belonging to, managed by, controlled by, or appertaining to such Indian tribe" (Oil Pollution Act);

38 U.S.C. §§ 3100, 3115(c) -- Authorizing the Secretary to use facilities of any Indian Tribe, including "any Alaska Native village," in connection with the veterans' vocational rehabilitation program;

42 U.S.C. §§ 4950, 5061(5) -- Including recognized Alaska Native villages as "public agencies or organizations" to carry out programs under the Domestic Volunteer Services Act.

42 U.S.C. § 280d(a)(d)(4), (o)(3) -- Including "any Alaska Native village" as an Indian tribe eligible to administer grants for services for children of substance abusers;

42 U.S.C. §§ 629, 629a(a)(6) -- Including Alaska Native

villages as tribes to operate family preservation and support services;

42 U.S.C. § 1996a(a), (c) -- Including "any Alaska Native village" among tribes (and their members) to be protected under the American Indian Religious Freedom Act;

42 U.S.C. §§ 2991b(d)(1)-(2), 2991f(a)-(c), 2992c(2) -- Authorizing administration for Native Americans to fund various environmental and Defense Department environmental mitigation initiatives on ANCSA lands "under the jurisdiction" of a federally-recognized Native village;

42 U.S.C. §§ 4701, 4762(5) -- Including the "recognized governing body of . . . any Alaska Native village . . . which performs substantial governmental functions" among the "local governments" and "general local governments" to receive grants, training and development opportunities under the Intergovernmental Personnel Act;

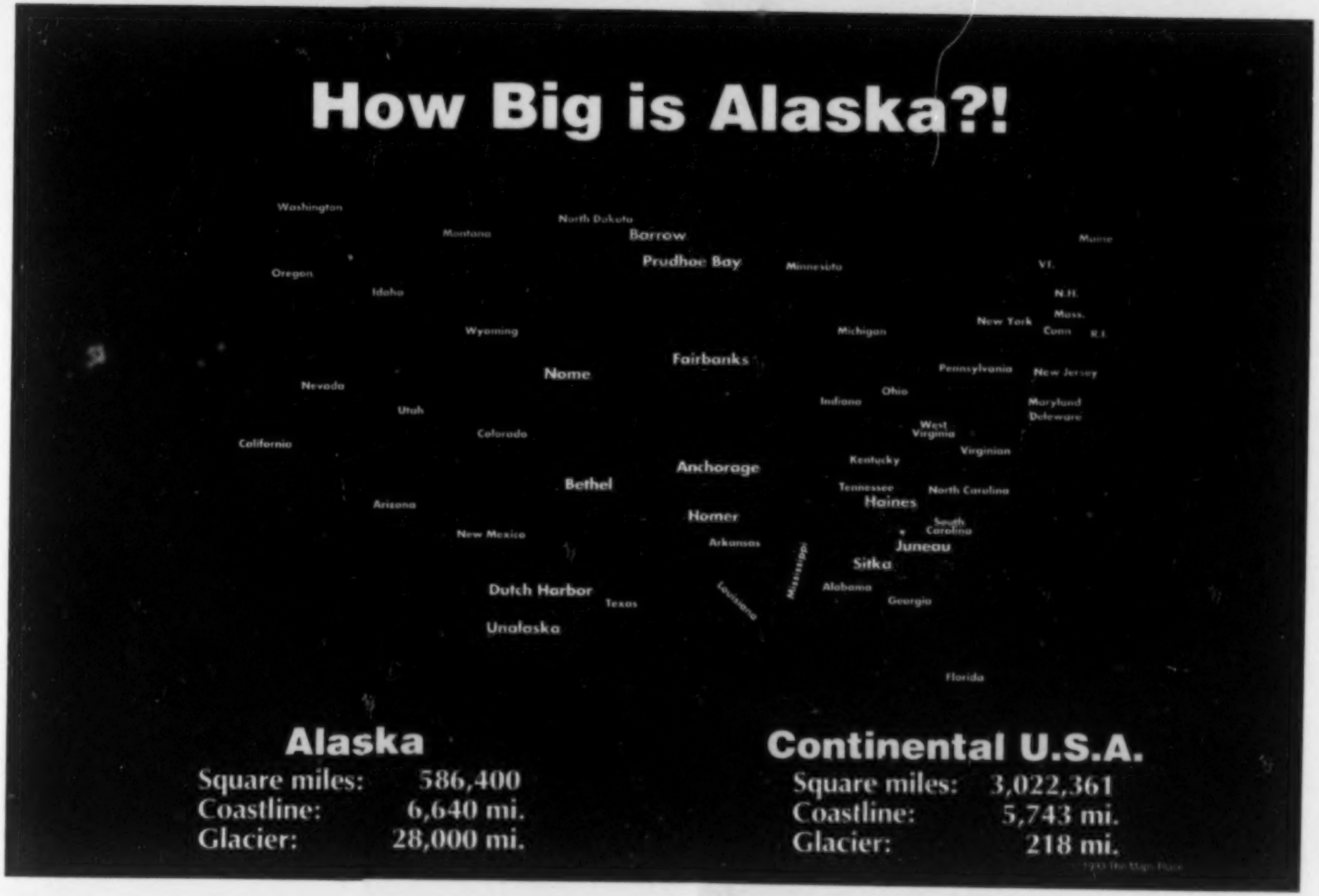
42 U.S.C. § 7601(d), 7602(r) -- Treating Alaska Native village tribes "exercising substantial governmental duties and powers" over any "area within the tribe's jurisdiction" on an equal footing with states in connection with the Clean Air Act;

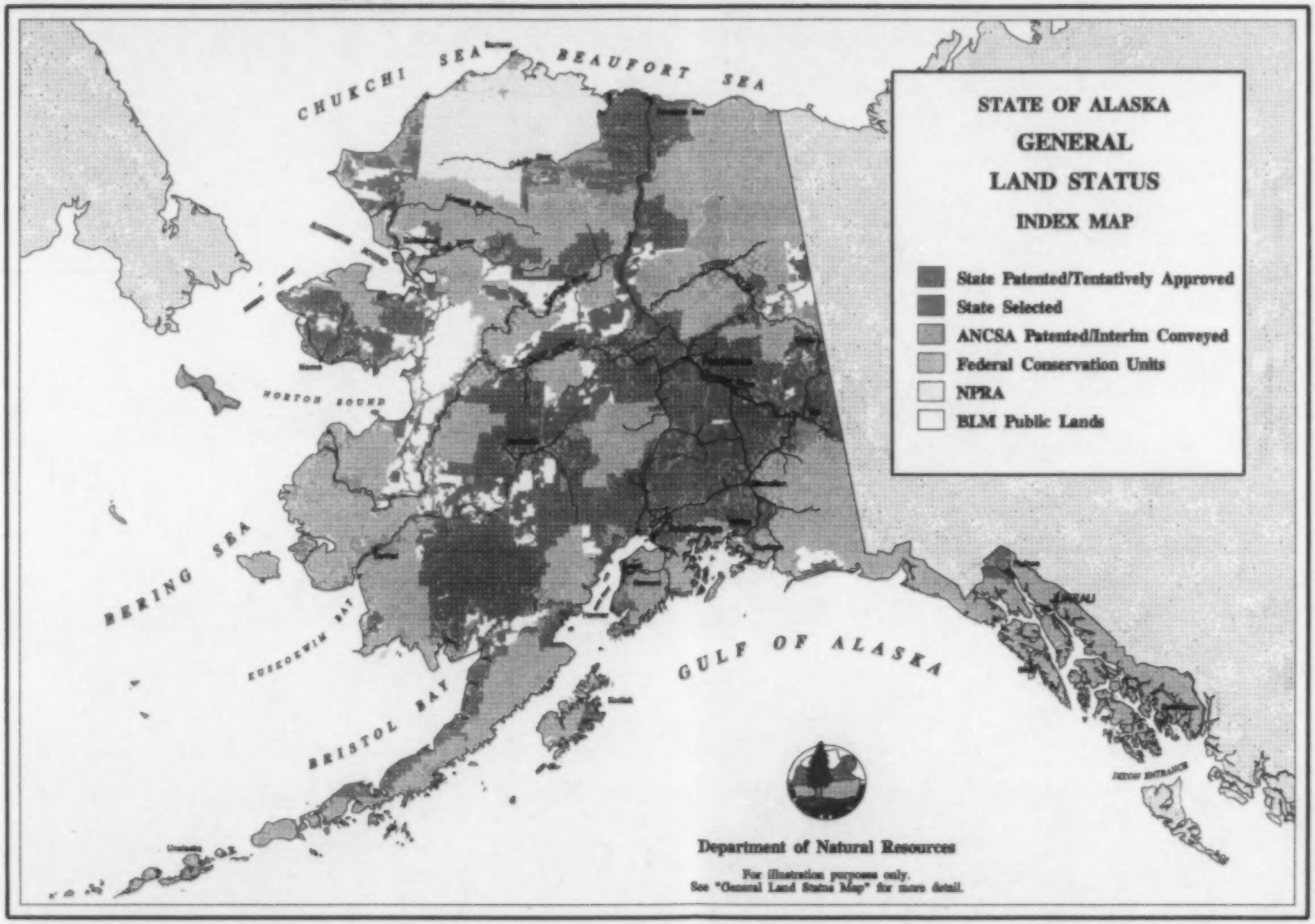
42 U.S.C. §§ 9601(36), 9626 -- Treating Alaska Native village tribes as states in connection with various environmental regulation activities involving hazardous materials (Comprehensive Environmental Response Compensation and Liability Act);

42 U.S.C. §§ 9831, 9832(10) -- Making Indian tribes, including "any Native village" eligible to operate Head Start programs;

42 U.S.C. §§ 11301, 11472 -- Set-asides for job training demonstration programs and the emergency community services homeless program available to recognized Indian tribes, including any Alaska Native village;

42 U.S.C. §§ 13741, 13742, 13743 -- Authorizing the Ounce of Prevention Council to make grants to Alaska Native villages for after school mentoring, tutoring, and job placement programs, and programs to reduce substance abuse, child abuse, and adolescent pregnancy.


How Big is Alaska?!
Washington
Montana
North Dakota
Barrow
Prudhoe Bay
Minnesota
Maine
Vt.
N.H.
Mass.
R.I.
Conn
New York
Oregon
Idaho
Wyoming
Michigan
Fairbanks
Nome
Pennsylvania
New Jersey
Nevada
Utah
Ohio
Indiana
Maryland
Deleware
West Virginia
Virginian
Kentucky
California
Colorado
Anchorage
Bethel
Tennessee
North Carolina
Haines
Arizona
Homer
South Carolina
New Mexico
Arkansas
Juneau
Sitka
Mississippi
Louisiana
Alabama
Georgia
Dutch Harbor
Texas
Unalaska
Florida
Alaska
Square miles: 586,400
Coastline: 6,640 mi.
Glacier: 28,000 mi.
Continental U.S.A.
Square miles: 3,022,361
Coastline: 5,743 mi.
Glacier: 218 mi.



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No. 96-1577

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STATE OF ALASKA,
Petitioner,

v.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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OTHER AUTHORITIES:

David S. Case, *Alaska Natives and American Laws* (1984 ed.) 17, 18-19

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Native American Rights Fund, *Yes, There is Indian Country in Alaska*, 22 NARF Legal Rev. 1 (Winter/Spring 1997) 15

Sidney L. Harring, *Crow Dog's Case* (1995) 18, 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 96-1577

STATE OF ALASKA, *Petitioner*,

v.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *et al.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

I. THE VILLAGE'S AUTHORITY TO IMPOSE THE TAX AT ISSUE TURNS ON WHETHER THE LAND IS INDIAN COUNTRY.

Respondents begin by urging the Court to avoid the principal question presented altogether, briefly suggesting that the judgment below may be sustained on the ground that the Village may tax non-members whether or not the land is Indian country. *See* Resp. Br. 21-22. There are several problems with this tack, beginning with the fact that this argument was never raised or passed upon below. Quite the contrary, respondents have explicitly argued throughout this litigation that the Village's authority to tax non-members turns on whether the land is "Indian country,"[1] which is the precise issue that both

[1] *See* Br. for Native Village of Venetie Tribal Gov't, *et al.*, p. 13 (9th Cir.), quoted at Pet. Br. 18 n.19; Post-Trial Br. for Native

the District Court (Pet. App. 39a) and the Ninth Circuit (*id.* 6a) addressed and decided below. This new argument accordingly cannot be relied upon in defending the Ninth Circuit judgment. *See United States* v. *Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994); *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 38-39 (1989); *Heckler* v. *Campbell*, 461 U.S. 458, 468 (1983).

In any event, respondents' new argument is unavailing. While this Court has said that an Indian tribe's "power to exclude non-Indians from Indian lands" may provide "a basis for tribal authority to tax," *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982), it has done so *only* in cases in which the underlying land was indisputably Indian country. Thus, for example, in both *Merrion*, 455 U.S. at 133-134, and *Kerr-McGee Corp.* v. *Navajo Tribe of Indians*, 471 U.S. 195, 197 (1985)—the cases relied upon by respondents—the tribal taxes at issue applied to activities on Indian reservations, the prototypical example of Indian country.[2] We are aware of no case from this or any other court—and respondents have cited none—upholding a tribal tax on non-members outside Indian country. Instead, courts have held that "[i]n order to determine whether * * * Tribes have jurisdiction [to tax] we must * * * look to whether the land in question is Indian country." *Mustang Prod. Co.* v. *Harrison*, 94 F.3d 1382, 1385 (10th Cir. 1996), *cert.*

Village of Venetie IRA Council, p. 1 (District Court) (question presented is "whether the Native Village of Venetie is Indian country as defined in 18 U.S.C. § 1151(b)").

[2] *Merrion*, for example, involved the taxing power of "Indian tribes *within 'Indian country,'*" and considered "the Tribe's authority to tax non-Indians who conduct business *on the reservation*." 455 U.S. at 140-141 (internal quotation marks and citations omitted; emphases added). This principle works in the other direction, too. Thus, the Court has made clear that the rule that Indian tribes are generally immune from state taxation "does not operate outside Indian country." *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 464 (1995).

denied, 117 S. Ct. 1288 (1997); *see* Pet. App. 137a (same).

That is particularly true here, because the tax at issue is confined by its express terms to "Indian country." *Native Village of Venetie Tax Code* § 146 (Pl. Ex. 141). In addition, to the extent that the Village now seeks to ground its authority to tax on the ability to exclude nonmembers from the land, it is far from clear that this authority may be invoked to exclude and therefore impose a tax on agents of the State, especially when, as here, they have entered the land to improve public facilities that the State is indisputably entitled to "occupy and use." Resp. Br. 5-6 n.4.[3]

Accordingly, as articulated by the courts below (Pet. App. 6a, 39a), explained by petitioner (Br. i, 18), and reflected in respondents' own formulation of the question presented, the dispositive issue in this case is whether "the Native Village of Venetie * * * occupies Indian country." Opp. Cert. i; Resp. Br. i.

II. THE EXISTENCE OF INDIAN COUNTRY DEPENDS ON THE INTENT OF CONGRESS, WHICH CLEARLY FORECLOSES THE VILLAGE'S CLAIM.

1. When it comes to addressing that question, respondents' basic refrain seems to be that Venetie is Indian country because, in their view, the land has the look and feel of it. Thus, respondents paint a romantic picture of the "Neets'aii Gwich'in Indians" and their "homeland," attempting to lull the Court with the "migratory rhythms of caribou and salmon" passing Venetie's way. Resp. Br.

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[3] As respondents acknowledge (Br. 5-6 n.5), the Village has given the Yukon Flats School District—a creature of state law—a 55-year lease "to occupy and use * * * school sites and related facilities in [Venetie]." The School District operates schools in Venetie and the surrounding region in fulfillment of the State's obligation to "establish and maintain a system of public schools open to all children of the State." Alaska Const. art. 7, § 1.

1. All can agree that the residents of the Village of Venetie—like those of hundreds of other Native, non-Native, and mixed communities in rural Alaska—occupy a rustic land that, despite the presence of modern conveniences such as electricity, motorized vehicles, and satellite dishes, still retains a frontier air. "Indian country," however, is a jurisdictional, not a descriptive concept.

While respondents (Br. 2, 20) seek to downplay the obvious jurisdictional consequences of holding that the 226 Alaska Native villages (including Venetie) occupying millions of acres of ANCSA land constitute—or may constitute, subject to the vagaries of a multi-part balancing test—Indian country, it is indisputable that this determination directly affects the civil and regulatory jurisdiction of the State over this land. *See* Pet. Br. 18 & n.9; Br. for California *et al.* 6-12. As the Department of the Interior put it, "[i]n both legal and practical effect, classifying [ANCSA] lands as Indian country would create huge jurisdictional enclaves, presumptively outside the reach of state jurisdiction." DOI Op., p. 118. Even respondents, who first claim this case is only about taxes, eventually acknowledge that it concerns the "authority to govern the land," Br. 43—a power ordinarily vested in the State, not private landowners.

It is for this reason that the Indian country inquiry turns on *congressional intent* to designate land as Indian country—and thus displace normal state jurisdiction over the land—not on some amorphous judicial determination that a particular tract of land has a "uniquely Indian character," or is a "distinctly Indian community." Resp. Br. 22, 25. *See* Law Profs. Br. 3 (Venetie is Indian country because it is "as 'Indian' a place as one can imagine").[4] What is "distinctly Indian" to one person

[4] In *United States* v. *Pelican*, 232 U.S. 442, 449 (1914), this Court adverted to the fact that the land in question had "a distinctly Indian character." This was not, however, because of the Court's subjective impression of the community; rather, it was because, as the Court continued, the land was "devoted to Indian occupancy *under the limitations imposed by Federal legislation.*" *Id.* (emphasis added). Congressional action to assume federal responsibility and displace the normal reach of state law—not the result of some judicial Rorschach test—was determinative.

may not be to another; indeed, the history of Alaska Natives is entirely different from that of the Indians in the lower 48 States, creating confusion for most of Alaska's history as to whether Native villages in Alaska are even "Indian tribes." *See* Pet. Br. 3-10; *infra* at 12.[5]

The threshold jurisdictional determination whether Venetie is Indian country should not be left to the vagaries of such a subjective and free-wheeling test. *See* Pet. 29. Rather, this Court should adhere to the approach carved by existing precedent, and embraced even by the principal secondary authority upon which respondents and their amici rely (Cohen), and look to the intent of Congress. *See* Pet. Br. 18-19. As we explained in our opening brief, that intent—which Congress made surpassingly clear in ANCSA—forecloses any judicial determination that Venetie, or any of the other lands conveyed

[5] The difficulties inherent in untethering the Indian country inquiry from congressional intent are underscored by the widely varying formulations offered by respondents' amici as *the* definitive "dependent Indian community" test. *See, e.g.*, TCC Br. 8 n.5 ("It is sufficient that a 'dependent Indian community' use or occupy land *as a community* in order for that land to be Indian country.") (emphasis in original); AFN Br. 2 ("villages [are Indian country if they are] occupied almost exclusively by Natives, governed in the traditional way, and dependent upon the resources of their territory for their existence"); *id.* 19 n.25 (listing six different factors that "in toto" are "relevant" to the analysis); Law Profs. Br. 11 ("As long as the indicia of dependence exist and Native people continue to reside together in a reasonably distinct location recognized as their residence by the federal government, they should be considered 'dependent Indian communities.'") (internal quotation marks omitted).

as part of the Alaska Native claims settlement, is Indian country.[6]

2. ANCSA presents two immediate and insurmountable problems for respondents' theory of the case. In arguing that Venetie is (and always has been) Indian country, respondents repeatedly state that the land is their aboriginal "homeland," *e.g.*, Br. 1, 19, 33, 37, 50, apparently seeking to invoke "the rule of *Bates* v. *Clark*, 95 U.S. 204, 208 (1877)." Resp. Br. 33. Under *Bates* —which was superseded in 1948 by the federal Indian country statute—the existence of Indian country turned on whether Indian-occupied land was aboriginal. *See* 95 U.S. at 208-209. Even under this rule, however, when aboriginal title is extinguished, the land "cease[s] to be Indian country." *Id.* at 208. In ANCSA, Congress not only expressly extinguished all aboriginal title to Native-occupied lands in Alaska (including Venetie), 43 U.S.C. § 1603(b), it extinguished "[a]ll claims * * * *based on* claims of aboriginal right, title, use, or occupancy of land." *Id.* § 1603(c) (emphasis added). *See* Pet. Br. 33 n.23.[7]

In arguing that Venetie is Indian country, respondents also rely heavily on the fact that the land *used* to be a

[6] In their effort to side-step ANCSA, respondents assert that "in every case where the area in question has been the home of a federally recognized tribe, Indian country has been found." Resp. Br. 32 n.28. That is not true and, even if it were, would not permit this Court to disregard the intent of Congress in ANCSA. The area within the Rosebud Sioux Reservation, for example, was home to some 2000 Rosebud Sioux, but that did not prevent this Court from giving effect to Congress' intent to disestablish the reserve and, thus, eliminate the land's Indian country status. *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 613-614 & n.47 (1977).

[7] Respondents refer to the Venetie tract as "unceded." Resp. Br. 33, 38, 41, 42. But the land patented to ANCSA corporations pursuant to ANCSA—including the Venetie tract—was clearly "ceded": aboriginal title to the land was expressly extinguished by Congress, 43 U.S.C. § 1603, and the land was expressly designated as "public." *Id.* § 1610.

reservation. *E.g.*, Br. i, 3, 5, 20, 33, 38, 40-41. In ANCSA, Congress expressly revoked the few existing reserves that had been created in Alaska (save Metlakatla). 43 U.S.C. § 1618(a). The Village continues to suggest that this revocation was a "technical[ity]," Resp. Br. 20, 40, but it was nothing of the sort. Under well-established law, one of the principal consequences of a congressional decision to revoke a reservation is that the land "within the historical boundaries of the [former] reservation, is not 'Indian country.'" *Hagen* v. *Utah*, 510 U.S. 399, 401 (1994). *See* Pet. Br. 32.

That is the end of the matter. This Court has never undertaken a second-tier inquiry to see if the land nevertheless retains its Indian country status because it has—as, presumably, would *all* newly revoked reserves—"a uniquely Indian character." Resp. Br. 22. It did not do so in *Hagen*, in *Rosebud Sioux Tribe*, or in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975); instead, in each of these cases, the Court, having determined that Congress revoked the land's reservation status, concluded that the land was not Indian country and that, as a result, normal state jurisdiction applied. This makes perfect sense. Permitting Indian country status to survive the disestablishment of a reservation would eliminate the most significant jurisdictional consequence of revoking the reservation, a fact that plainly was not lost upon the ANCSA Congress. *See* Pet. Br. 28-30, 36 n.25.

In any event, there is nothing "technical" (Resp. Br. 20) about ANCSA's revocation of the few reservations that had been created in Alaska. As respondents themselves acknowledge, the ANCSA Congress was "'vehemently antireservation'" and "sought 'to avoid perpetuating in Alaska the reservation and trustee system.'" Resp. Br. 44 n.43 (quoting legislative record). *See* Pet. Br. 28-30. ANCSA's express purposes, 43 U.S.C. § 1601(b), and its provisions extinguishing aboriginal title, *id.* § 1603(b), stripping the land of pre-existing federal controls, *id.* §§ 1603(b)-(c), 1606, 1607(a), 1613(g),

1617, 1618(a), and making the land a freely alienable corporate asset subject to state (not federal) law, *id.* §§ 1606(d), 1607, are all a testament to that clear intent.[8] Judicial designation of ANCSA land as Indian country within Section 1151(b), and thus the functional equivalent of a reservation, would—in gross disregard of that intent—have the effect of establishing the largest single reservation system in the history of this country.

III. NEITHER VENETIE NOR ANY OF THE OTHER SETTLEMENT LANDS QUALIFIES AS A "DEPENDENT INDIAN COMMUNITY" UNDER SECTION 1151(b).

1. As we have explained, the dependent Indian community category of Section 1151 is a narrow adjunct to the more typical types of Indian country that surround it in the statutory listing, created by Congress to extend Indian country status to land that Congress has clearly dedicated for Indian use and occupancy as the equivalent of a reservation. *See* Pet. Br. 19-25. This Court's precedents—especially *United States* v. *Sandoval*, 231 U.S. 28 (1913) and *United States* v. *McGowan*, 302 U.S. 535 (1938)—compel this construction. *See* Pet. Br. 20-22.[9] While respondents would reject it out of hand, this construction hardly breaks new ground. It has been embraced not only by the federal agency charged with overseeing Indian affairs, DOI Op., pp. 114-115, but by Cohen, *see* Pet. Br. 23, and the lower courts, too. *See, e.g., Blatchford* v. *Gonzales*, 670 P.2d 944, 946 (N.M. 1983) ("Indian reservations and dependent Indian communities are not two distinct definitions of place, but definitions which largely overlap."), *cert. denied*, 464 U.S. 1033 (1984).

[8] Respondents seem to suggest that Congress was required to go still further and expressly negate their precise position in this case. This Court, however, has "never required [that Congress use] any particular form of words" in eliminating Indian territorial jurisdiction. *Hagen*, 510 U.S. at 411.

[9] Respondents object that the Pueblo Indians in *Sandoval* held "fee simple title" (231 U.S. at 48) to the land. But while the land in *Sandoval* was held in communal fee, it remained—pursuant to the explicit direction of Congress—"under the absolute jurisdiction and control of the Congress of the United States." *Id.* 37 n.1. *See* Pet. Br. 21 n.12. The land in this case emphatically is *not* subject to any such federal control, and thus is completely unlike the land in *Sandoval*. See Pet. Br. 9-10, 37. Yet such control—whether reflected in the title to the land or, as in *Sandoval*, in specific legislation—is key to Indian country status.

2. In fact, it is respondents, not the State, who ask this Court to break new ground. In framing the inquiry under Section 1151(b), respondents claim that the dispositive question is whether the Indians occupying the land are a federally recognized tribe and, thus, dependent on the federal government for their "political" existence; if they are, say respondents, then the land they occupy is automatically a dependent Indian community within Section 1151(b), regardless of whether the federal government has asserted any particular form of superintendence or control over the land. *See* Resp. Br. 23-26.[10]

This argument is defeated at the outset by the very federal recognition in which respondents now ground their Indian country claim. The list of federally recognized tribes in Alaska—which includes the Village of Venetie—expressly states that "[i]nclusion on the list *does not resolve the scope of powers of any particular tribe over land or non-members.*" 60 Fed. Reg. 9250, 9251 (Feb. 16, 1995) (emphasis added; footnote omitted). If that were not clear enough, the quoted passage is immedi-

[10] As a consequence of this approach, respondents and their amici suggest that, in arguing that ANCSA land is not Indian country, the State somehow disputes the tribal status of the Native villages occupying the land. Respondents then invoke case law dealing with the termination of tribal status, *see* Resp. Br. 38-39, and claim that the "question presented by the State * * * is whether ANCSA was a termination act." *Id.* 40 n.37. Tribal status and Indian country, however, are distinct concepts. *See* Pet. Br. 12 n.8; *see infra* at 16-17. The question in this case is whether ANCSA land is Indian country; the State has never argued that ANCSA terminated the tribal status of the land's inhabitants.

ately followed by a footnote acknowledging the 1993 DOI opinion concluding that ANCSA precludes recognition of settlement land—such as the Venetie tract—as Indian country. *Id.* at 9251 n.1. This important distinction between tribal status and the existence of Indian country—which was also recognized in the first Federal Register designation of federally recognized tribes in Alaska, *see* 58 Fed. Reg. 54364, 54366 n.1 (Oct. 21, 1993)—is simply ignored by respondents in crafting their argument that Indian country status flows inexorably from tribal recognition.

Respondents' reliance on tribal status as the touchstone of the dependent Indian community test is also doctrinally flawed. Under this approach, the heretofore circumscribed dependent Indian community category of Section 1151(b) would swallow the entire Indian country statute —not to mention tens of millions of acres of land in Alaska and the contiguous United States not designated as Indian country by Congress—because, under this test, practically *any* land occupied by a federally recognized tribe would be Indian country. This is an astonishing new conception of the dependent Indian community test. ANCSA, however, forces respondents to advance it because, as both the District Court and the Ninth Circuit found, and as respondents themselves acknowledge (Br. 13), ANCSA unmistakably relinquished federal superintendence and control over the land conveyed as part of the settlement, including Venetie.[11]

In any event, this Court's Indian country precedents plainly contemplate superintendence over the land, not

[11] *See* Pet. App. 29a ("Today, Venetie owns its land in fee simple, and the federal government exercises few controls (if any) over Venetie's territory") (Ninth Circuit); *id.* 70a ("The federal government no longer has any right or responsibility for the active supervision of Alaska Natives with respect to the lands which they occupied after extinguishment of aboriginal title.") (District Court); DOI Op., p. 121 ("The present relationship between ANCSA-conveyed Native landholdings and the Federal government * * * cannot be characterized as a guardianship or as related to a trust.").

simply the political entity inhabiting it. The Court has consistently stated that "the principal test" for determining whether land is Indian country is "whether *the land in question* 'had been validly set apart for the use of the Indians as such, under the superintendence of the Government.'" *United States* v. *John*, 437 U.S. 634, 649 (1978) (citing *United States* v. *Pelican*, 232 U.S. at 449; *McGowan*, 302 U.S. at 539) (emphasis added). Reading the superintendence prong of this test to modify "Indians" rather than "the land in question"—as respondents do—effectively eliminates the superintendence requirement altogether, since, under this approach, superintendence will always be present whenever the land is occupied by a federally recognized tribe. This Court, however, has always looked separately to whether Congress retained federal control over the *land* in question.

Thus, for example, in *Pelican* the Court held that the lands in question—certain Indian allotments—were Indian country *not* because the allotments were occupied by Indians, but because "the Government retain[ed] control" over these lands. 232 U.S. at 449. As the Court emphasized, the allotment statute left "no room for doubt as to the intent of Congress with respect to the maintenance of the Federal jurisdiction *over the allotted lands.*" *Id.* at 451 (emphasis added). Likewise, in *McGowan* the Court—in concluding that the requisite superintendence was present—emphasized that "[t]he Government retains title to the lands which it permits the Indians to occupy" and "the authority to enact regulations and protective laws *respecting this territory*." 302 U.S. at 539 (emphasis added). *John* is to the same effect. *See* 437 U.S. at 649 (emphasizing that "[t]he Mississippi lands in question here were declared by Congress to be held in trust by the Federal Government").[12]

[12] The focus on Congress' intent to assume superintendence over the land is key because, as discussed, Indian country is presumptively beyond the reach of state law, meaning that the federal government must oversee regulation not only of the people who occupy Indian country, but the land itself.

Respondents' emphasis on the political status of the land's occupants also suffers from an historical anachronism. Throughout most of Alaska's history, the status of Alaska Native villages as "Indian tribes" has—because of the unique history of these communities—been unsettled. *See* DOI Op., p. 48.[13] In 1993 the federal government sought to resolve this issue and, over the objection of many, recognized these villages as tribes—with, as noted, the important caveat that such recognition did not imply Indian country status. 58 Fed. Reg. 45364. Nevertheless, the fact that in 1971 Alaska Native villages had *not* been recognized as tribes provides still another reason to reject respondents' theory of why ANCSA land is Indian country: the basic predicate for that theory was not even established when ANCSA was passed. *See United States* v. *Wise*, 370 U.S. 405, 411 (1962) ("Statutes are construed by the courts with reference to the circumstances existing at the time of passage").

Viewed from the proper perspective, both the clear intent of Congress in enacting ANCSA and the record before this Court support only one conclusion: the requisite superintendence is lacking over Venetie and the tens of millions of additional acres of land conveyed as part of the settlement. *See* Pet. Br. 39-45. The absence of federal control over the land is itself a sufficient basis to reach this conclusion, and to deny respondents' Indian country claim. *See* Pet. Br. 40-41.[14]

3. When it comes to the other principal requirement of this Court's Indian country test—the federal set aside—

[13] Respondents' own authorities recognize as much. *See, e.g.*, Deborah Niedermeyer, *"The True Interests of a White Population": The Alaska Indian Country Decisions of Judge Matthew P. Deady*, 21 Int'l L. & Pol. 195, 204 n.54 (1988).

[14] The federal government has acknowledged its lack of control. *See* DOI Op., p. 121 ("Because [ANCSA landholders] have complete freedom to control their lands, those lands and the Natives located on them *cannot* be regarded as dependent Indian communities as that term has been understood.") (emphasis added).

respondents rely on the land's *former* status, suggesting that the requisite set aside is met because the Venetie tract was originally "set apart from the public domain under the rule of *Bates* v. *Clark*," and used to be a reserve. Resp. Br. 33; *see* Opp. Cert. 23-24. Respondents then assert that "ANCSA continued" the pre-existing set aside simply because it treated Venetie as "a reasonably distinct location." Resp. Br. 33 (internal quotation marks omitted). It is difficult to imagine a more ill-conceived test. In ANCSA, Congress expressly eliminated any set aside that may have existed by both extinguishing the land's aboriginal title and revoking its reservation status. *See supra* at 6-7.

The fact that ANCSA corporations established by villages occupying extinguished reserves were given the *option* of acquiring title to former reservation land as part of the settlement does not establish the requisite set aside. As we explained in our opening brief (p. 34), in every previous case in which this Court has found a set aside, Congress had explicitly designated the land as either "Indian country," a "reservation" or its equivalent, or "trust land," thereby devoting the land to Indian use and occupancy, until *Congress* said otherwise. By contrast, in ANCSA, Congress extinguished the pre-existing federal controls over the land (including reservation status), made the land freely alienable, then conveyed it to state-chartered for-profit corporations to do with as they see fit. *See* Pet. Br. 34-35.

The Village received title to the Venetie tract by way of a fee transfer from the ANCSA corporations which had received the land under the settlement. Pet. App. 4a. It is undisputed that, if it wished to do so, the Village could turn around and convey the land in whole or part to another entity—Native or not—as many other ANCSA landholders have done in the wake of the settlement. *See* Pet. Br. 9-10, 37 & n.27; Koniag Br. 10-11, 25; AFN Br. 24 n.31; J.A. 155 ("Congress has consented in the

Settlement Act to unrestricted Native alienation of ANCSA patented lands") (DOI letter). The free alienability of the Venetie tract is perhaps the clearest possible proof of the *absence* of the requisite set aside, since it absolutely belies any notion that Congress sought to ensure "permanent protection of [the Village's] land." Resp. Br. 41.

In ANCSA, moreover, Congress not only did not devote the land to any permanent use, it did not convey it to "Indians as such." *See* Pet. Br. 35-36; DOI Op., p. 82. Contrary to the suggestion of respondents (Br. 45-49), Congress went out of its way to make certain that the land was conveyed *not* to Indians or tribal entities, but rather to racially-neutral, state-chartered, for-profit business corporations that—quite unlike tribes occupying Indian country—were made subject to state law, even state taxes. *See* Pet. Br. 34-36. Thus, as the Department of the Interior concluded, "conveyance of former Venetie Reserve lands to the ANCSA entities in fee was * * * *not* to tribes." J.A. 152 (DOI letter) (emphasis added). *See also* Shee Atika Br. 6-16 (discussing the significant differences between ANCSA corporations and tribal entities).[15]

This was, to be sure, a marked departure from prior Indian legislation, *see* Pet. 5 n.5—made possible by the unique history of Alaska and its Natives—and one from

[15] Respondents and their amici point to Section 1602(j) of ANCSA, which states that Village corporations were organized under state law to "hold, invest, manage and/or distribute" the land "for and on behalf of a Native village * * *." *See* Resp. Br. 20, 36, 45. This provision, however, cannot be understood without the omitted text in place of the ellipses, which continues "*in accordance with the terms of this chapter.*" 43 U.S.C. § 1602(j) (emphasis added). Those terms, as discussed, made clear that Congress sought to avoid the creation of "racially defined institutions," *id.* § 1601(b), and subjected ANCSA corporations to state law, which, among other things, requires that corporate assets be managed for the benefit of shareholders, regardless of their race or ethnic origin. *See* Shee Atika Br. 4 ("In no sense does the ANCSA corporation hold its ANCSA assets 'for' the local tribe or the tribe's members."); *id.* 16-18 (same).

which Venetie was *not* excepted.[16] In fact, the Venetie tract was initially conveyed—just like the tens of millions of other acres of land subject to the settlement—to state-chartered ANCSA corporations, which, in the case of Venetie, held it for *six years* before they unilaterally elected to convey the land to the Village. *See* Pet. Br. 11.[17] This conveyance was hardly a federal set aside; it was a "voluntary act," "not joined in nor approved by the federal government." Pet. App. 75a. The federal government agrees. *See* DOI Op., pp. 122-123. Only Congress can create Indian country. Neither ANCSA nor this Court's Indian country precedents "permit Native villages to create Indian country in Alaska by unilateral action." DOI Op., p. 132. That, of course, is precisely what the Village of Venetie has attempted to do. *See* Pet. Br. 39.[18]

[16] Respondents once again seek to distinguish Venetie from other ANCSA land. But the only pertinent difference with Venetie (and the other revoked reserves) is that—in light of Section 1618(a)—Congress' intent that the land *not* be Indian country is even more clear. *See* Pet. Br. 33; Reply to Opp. 3-6. Any other distinctions are without a difference. Indeed, respondents' own counsel declared that the Ninth Circuit "holding is not unique to Venetie and, therefore, will apply to virtually all other Native villages." Native American Rights Fund, *Yes, There is Indian Country in Alaska*, 22 NARF Legal Rev. 1, 2 (Winter/Spring 1997). And, of course, respondents' central argument—that Venetie is Indian country because it is "homeland"—is not limited to this case. As respondents themselves point out, "[l]ike Venetie, many [villages] remain in possession of their ancestral lands." Resp. Br. 7-8. Congress was well aware of that when it passed ANCSA; Native claims of aboriginal ownership were one of the principal factors that prompted Congress to act. The ANCSA Congress would be shocked to learn, however, that—having gone to such extraordinary lengths to extinguish aboriginal title and relinquish federal control over these lands—Native villages such as Venetie could assert that they occupy Indian country.

[17] Respondents' statement (Br. 34) (internal quotation marks omitted; bracketed material in original) that "Congress granted to [Venetie] title" to the land is, accordingly, flat wrong.

[18] In arguing that the Venetie tract "continue[s]" to be set aside under ANCSA, respondents also rely upon various subsequently enacted statutes in which Congress has specifically referenced

IV. DESIGNATING SETTLEMENT LANDS AS INDIAN COUNTRY WOULD OVERTURN THE LONG-STANDING JURISDICTIONAL REGIME IN ALASKA.

1. There is nothing anomalous about the result called for by ANCSA. While they often coincide—at least, historically speaking, in the lower 48 States—tribal status and Indian country are distinct concepts. Whether or not they occupy Indian country, Indian tribes retain inherent authority to "control internal relations." *Montana* v. *United States*, 450 U.S. 544, 564 (1981); *see* Pet. App. 80a-81a. Accordingly, the District Court below held in a related case that, as a tribe, the Native Village of Venetie may—without regard to whether it occupies Indian country—regulate member adoptions. *See id.* 126a. The State does not challenge that ruling; it challenges the Village's assertion of the authority to govern—to the presumptive exclusion of state law—the 1.8 million-acre Venetie tract and the activities of non-members on it. The exercise of that authority requires an additional determination that the tribe occupies Indian country. *See* Pet. Br. 18; DOI Op., pp. 108-110. As noted, the Department of the Interior itself made that clear when it recognized the Village of Venetie and 225 other Alaska Native villages as Indian tribes. *See supra* at 9-10.

Consistent with this framework, this Court has recognized that Congress may revoke a reservation—and, with it, the land's Indian country status—without terminating the federal government's trust relationship with the tribe occupying the land, leaving intact the tribe's authority over internal matters. *See DeCoteau* v. *District County*

Alaska Native villages or ANCSA lands. *See* Resp. Br. 34-36. What is significant about the cited statutes is not that Alaska Native villages or ANCSA lands are covered, but rather *how* they are covered—by special mention that would be wholly unnecessary if Congress thought the land was Indian country under Section 1151(b). Respondents' other efforts to invoke subsequent legislative history fail for the reasons stated in our opening brief. *See* Pet. Br. 45 n.33.

Court, 420 U.S. at 442-443.[19] In addition, the court has held that the authority of the States to govern Indian lands and activities turns on the Indian country determination, not simply on whether the subject of regulation is a federally recognized Indian tribe. *See, e.g., Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 125 (1993) (test for whether "tribal members" are outside normal state jurisdiction is "whether the land is Indian country").[20]

Above all, this Court has made clear that Congress has plenary authority to establish (or restrict) the sovereignty of Indian tribes, whether it be over members, non-members, or land. *See* Pet. Br. 18-19; *Three Affiliated Tribes* v. *Wold Eng'g, P.C.*, 476 U.S. 877, 884-885 (1986). That principle controls here. As respondents' own authorities attest, one of the overriding purposes of ANCSA was to sever ANCSA land from Native government. *See* David S. Case, *Alaska Natives and American Laws* 447 (1984 ed.) ("unlike previous and subsequent aboriginal settlements, [ANCSA] severed Native land ownership from Native government") (footnotes omitted).

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[19] Similarly, there is no requirement that an Indian group occupy "Indian country" to receive federal recognition as a sovereign tribe in the first place. *See* 25 C.F.R. § 83.7 (1997).

[20] *See also Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (same); *Bryan* v. *Itasca County, Minn.*, 426 U.S. 373, 376-377 n.2 (1976) ("[s]tate laws generally are not applicable to tribal Indians on an Indian reservation," but generally are applicable to "tribal Indians who have left or never inhabited federally established reservations") (internal quotation marks omitted); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148-149 (1973) ("Absent express federal law to the contrary, Indians *going beyond reservation boundaries* have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.") (emphasis added); *A-1 Contractors* v. *Strate*, 76 F.3d 930, 939 (8th Cir. 1996) (The Supreme Court's decision in *"Montana* [v. *United States, supra*] implicitly recognizes that without the geographic connection to Indian country, the tribes would have no plausible grounds for asserting jurisdiction over the non-Indian parties."), *aff'd*, 117 S. Ct. 1404 (1997).

As Judge Fernandez put it, "[i]f ANCSA meant anything at all, it meant that the tribes, as such, would no longer have control or sovereign power over the land. They would only have sovereignty over their own members." Pet. App. 35a. In its 133-page opinion on the precise question presented here, the Department of the Interior reached the same conclusion. *See* DOI Op., pp. 107-108, 131-132.[21]

2. In effect, that is the way it has always been in Alaska. As we explained in our opening brief (pp. 5-7), in Alaska—quite unlike the situation in the lower 48 States—Native villages traditionally have been subject to the full gamut of state laws and regulations. While respondents attempt to create a different impression, the authorities upon which they rely confirm this important jurisdictional fact.[22] This Court's own decisions do so,

[21] While respondents urge the Court to ignore this opinion (Br. 29 n.25), it "has *not* been withdrawn or modified" by the agency, 60 Fed. Reg. at 9251 n.1 (emphasis added), and plainly is entitled to weight in construing ANCSA. The opinion's exhaustive analysis and even-handed treatment of the precise question presented here alone compel that conclusion. But, approved by the Acting Secretary (DOI Op., p. 133), the opinion represents the considered view of the agency that not only is charged with overseeing Indian affairs (25 U.S.C. § 2), but with administering ANCSA (43 U.S.C. § 1624), a statute it helped to draft. *See Aluminum Co. of Am.* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984) ("principles of [agency] deference have particular force" when the agency "has long-standing expertise in the area," and the agency "was intimately involved in the drafting and consideration of the statute by Congress"); Pet. 22. Thus, in analogous circumstances, courts have held that the Department's view is entitled to "considerable deference." *Aleknagik Natives Ltd.* v. *United States*, 806 F.2d 924, 926 (9th Cir. 1986) (Kennedy, J.) (deferring to DOI interpretation of ANCSA in non-published memorandum approved by Acting Secretary).

[22] *See, e.g.*, Sidney L. Harring, *Crow Dog's Case* 220 & n.40 (1995) (Alaska Natives "were made subject to all of the same laws that governed whites in the Territory of Alaska," including "a full range of white laws governing all aspects of social life"); Case, *supra*, at 13-14 ("It was generally presumed that the territory of Alaska had the same jurisdiction over Alaska Natives as over its

too. *See Metlakatla Indian Community* v. *Egan*, 369 U.S. 45, 51 (1962). If ANCSA lands were Indian country, it would turn this long-standing jurisdictional regime on its head, presumptively ousting state laws and jurisdiction from hundreds of communities and 97 percent of the privately-held land in the State. *See* Pet. Br. 48-49.

In light of the unique history of Alaska and its Natives, it was also established long before Congress enacted ANCSA that there was no Indian country in Alaska. *See* Pet. Br. 6-7; Harring, *supra*, at 214-220, 233-236 (discussing cases in which courts repeatedly "held that Alaska was not Indian country").[23] Respondents and their amici would like to revisit the nearly unbroken line of nineteenth century precedents holding as much, *see* Resp. Br. 9 & n.8, but their efforts are largely beside the point. These rulings indisputably formed the legal and historical backdrop against which the law governing Alaska Natives developed and, more to the point, Congress legislated when it passed ANCSA. As respondents' own authorities acknowledge, *see* Niedermeyer, *supra*, at 204, this backdrop provides still more support for the conclusion that ANCSA lands are not Indian country.

other citizens."). These authorities also refute the astonishingly revisionist assertion that, "[s]ince the Territory's purchase, Alaska Native tribes have been under the same legal regime applicable to all other Native American tribes." Resp. Br. 8. *See* Harring, *supra*, at 207 ("The legal history of Indian-white relations in Alaska is *substantially unrelated* to parallel developments in the rest of the United States.") (emphasis added).

[23] Respondents take issue with the statement that "'[v]ery few [reserves] were ever created'" in Alaska, Pet. Br. 4 (quoting *Egan*, 369 U.S. at 51), suggesting that "over 126 reservations" existed. Resp. Br. 11. In fact, "[p]rior to ANCSA there were only two statutory reserves and six IRA reserves" in Alaska. Case, *supra*, at 109. These were the only types of reservations in Alaska that "nearly approximated the true Indian reservations of the lower forty-eight states," *id.* at 108; the others apparently referred to by respondents consisted of "reindeer reserves," "school reserves" ranging in size from 3 to 40 acres, and miscellaneous community development "reserves," which did not begin to fit the typical mold. *Id.* at 118-119 n.43.

CONCLUSION

To sustain the Ninth Circuit ruling, respondents urge this Court to adopt an entirely new conception of the dependent Indian community category of Indian country. The distinguishing characteristic of this new approach is that it is largely divorced from any consideration of the intent of Congress or the Executive's interpretation of that intent. Respondents urge this Court to create and declare Indian country not only where Congress and the Executive have not, but where Congress and the Executive have unambiguously rejected such a designation. This Court should instead give effect to the clearly expressed intent of Congress and hold that ANCSA land is not Indian country.

For the foregoing reasons, and those in petitioner's opening brief, the Court should reverse the judgment of the Ninth Circuit below.

Respectfully submitted,

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IN THE
Supreme Court of the United States
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STATE OF ALASKA,
Petitioner,
v.
NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* SHEE ATIKA, INCORPORATED, IN SUPPORT OF RESPONDENTS NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *ET AL.*

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BRIEF OF *AMICUS CURIAE* SHEE ATIKA, INCORPORATED, IN SUPPORT OF RESPONDENTS NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *ET AL.*

INTEREST OF *AMICUS CURIAE*

Shee Atika, Incorporated (herein "Shee Atika")[1] is the corporation organized under the Alaska Native Claims Settlement Act[2] for Alaska Natives whose historic roots

[1] No person or entity other than Shee Atika has made a monetary contribution to the costs of preparing this brief. This brief is filed with the consent of the parties and their letters of consent have been lodged with the Clerk of this Court.

[2] Pub. L. No. 92-203, 85 Stat. 688 (1971), codified at 43 U.S.C. §§ 1601 *et seq.* (herein "ANCSA"). This brief generally cites both to the indicated ANCSA sections and the corresponding provisions

are in Sitka, Alaska. Shee Atika presently has approximately 2,345 shareholders, principally of Tlingit, Tsimshian and Haida Indian heritage. Shee Atika received approximately 26,000 acres of surface estate timberland in three locations in Southeast Alaska, as well as a modest amount of cash, under ANCSA. According to published reports, Shee Atika's book net worth of approximately $75 million makes it one of the larger ANCSA corporations.[3]

Shee Atika is filing this amicus brief because Shee Atika, as an ANCSA corporation which still owns the lands it received under ANCSA, has a pronounced interest in the outcome of this case. Shee Atika's legal position is that the Native Village of Venetie Tribal Government [4] and other various Alaska Native tribal entities [5] have "sovereignty," *i.e.*, governmental jurisdiction over those persons and entities which have *voluntarily* submitted to the tribe's

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of the United States Code. Although Shee Atika believes that the original version of ANSA is generally the controlling law in this case, this brief cites to current versions of the statute where appropriate.

[3] This includes approximately $45 million held in a settlement trust which Shee Atika established for its shareholders in 1993 pursuant to ANCSA § 39, 43 U.S.C. § 1629e.

[4] This brief refers to the Native Village Of Venetie Tribal Government simply as "Venetie".

[5] This brief uses the terms "tribe", "tribal entities", and "tribal organizations" interchangeably. All denote a group of Alaska Natives which have organized to exercise certain governmental powers, whether under federal authority (*i.e.*, the Indian Reorganization Act as made applicable to Alaska, infra note 10) or in a "traditional" mode (*i.e.*, without federal approval). These are intended to contrast with the terms "ANCSA corporation" and "Native corporation", which indicate only those corporations which organized under Alaska state law to receive the ANCSA settlement. Although the question in this case is technically whether Venetie is a "dependent Indian community" under 18 U.S.C. § 1151(b), for simplicity, this brief phrases the question in terms of whether or not such lands and other ANCSA lands are "Indian Country".

jurisdiction. Such jurisdiction includes ANCSA land only in the very limited circumstances of the present case where (1) the corporate shareholders of Venetie's ANCSA predecessors made an election under § 19(b)[6] of ANCSA to receive the lands of their former reserve and (2) those former reserve lands were conveyed to the tribal entity. Shee Atika believes that ANCSA land is not Indian Country unless both of the foregoing circumstances are present.

This case turns on a correct interpretation of ANCSA and understanding of the general relationship between the local ANCSA corporation and the local tribal organization. Shee Atika is organized under ANCSA, by and for Alaska Natives, and thus, is intimately familiar with how the rules of both ANCSA and Alaska state law interact *vis a vis* ANCSA corporations. A substantial number of Shee Atika's shareholders are *not* members of the local tribal organization for Sitka, the Sitka Tribe of Alaska, and Shee Atika believes that tribal jurisdiction over Shee Atika's ANCSA lands will adversely impact Shee Atika's interests and those of its shareholders. Shee Atika owes a fiduciary duty to protect the interests of *all* its shareholders, including those who are not members of the local tribe. By contrast, Shee Atika has *no* fiduciary duty to persons who are members of the local tribe but who are not Shee Atika shareholders.

SUMMARY OF ARGUMENT

I.

Although reaching the correct result that the Venetie lands are Indian Country, the Ninth Circuit majority opinion [7] incorrectly assumed that the local ANCSA cor-

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[6] ANCSA § 19(b) is discussed infra at note 42 and accompanying text.

[7] *State of Alaska, et al. v. Native Village of Venetie Tribal Government, et al.*, 101 F.3d 1286 (9th Cir. 1996).

poration is the same as the local tribal organization. In fact, they are different organizations, composed of different members and subject to different rules. Indian Country status is appropriate for Venetie's lands only because of the unique circumstances of an ANCSA § 19(b) election to acquire former reserve lands, followed by a conveyance of those former reserve lands into tribal ownership.

II.

Although reaching the correct result that the Venetie lands are Indian Country, the Ninth Circuit is incorrect to the extent that it suggests that all ANCSA corporate lands have been set aside for the local tribe or the tribal members. In no sense does the ANCSA corporation hold its ANCSA assets "for" the local tribe or the tribe's members. Instead, the ANCSA corporation has a fiduciary duty under Alaska state law only to its own shareholders, whether or not those shareholders are members of the local tribe. Despite repeated amendments to ANCSA in the past quarter century, Congress has never altered the rule that Alaska state law controls ANCSA corporations. In other legislation providing benefits to Indian lands, Congress itself has treated ANCSA corporate lands as not meeting the 18 U.S.C. § 1151 definition of Indian Country.

III.

Judge Fernandez's concurrence below was correct: there will be substantial adverse impacts on Shee Atika and other ANCSA corporations unintended by Congress if this Court does not hold that ANCSA lands can become Indian Country only after an ANCSA § 19(b) election followed by a conveyance to the tribal entity.

ARGUMENT

I. ALTHOUGH REACHING THE CORRECT RESULT THAT THE VENETIE LANDS ARE INDIAN COUNTRY, THE NINTH CIRCUIT MAJORITY OPINION INCORRECTLY ASSUMED THAT THE LOCAL ANCSA CORPORATION IS THE SAME AS THE LOCAL TRIBAL ORGANIZATION.

In Shee Atika's case, and in most other ANCSA corporate situations, it is the ANCSA corporation itself and not the local tribal entity which holds title to the land conveyed under ANCSA. ANCSA corporations (including Shee Atika) do not have or exercise governmental powers and are best described as private landowners. The ANCSA corporation is not the tribe.

In contrast, this case involves a highly unique factual pattern in which (1) there was a recognized tribal entity which had inhabited a reservation prior to ANCSA, (2) two ANCSA corporations were formed within the former reserve lands which had similar memberships in the aggregate when compared with the tribal entity, (3) the ANCSA corporations each elected under ANCSA § 19(b) to receive a portion of the former reserve lands, and (4) subsequently, both ANCSA corporations conveyed the former reserve land to the tribal entity and then dissolved. In short, the reservation land came full circle and was once again in the possession of the tribe. These facts, Shee Atika believes, justify a conclusion that the former ANCSA lands now owned by Venetie are "Indian Country" because of the uniqueness of the ANCSA § 19(b) election and the conveyance of the former reserve lands to Venetie. It is the fact that Venetie has acquired its former reserve (albeit through ANCSA) which satisfies the set aside requirement, and hence, why Indian Country status exists as to Venetie's lands.

Unfortunately, the Ninth Circuit majority opinion does not articulate this rationale to conclude that Venetie's lands are Indian Country. Instead, the Ninth Circuit's

majority opinion goes beyond the facts of Venetie and makes unwarranted generalizations about the relationships between tribal organizations and local ANCSA corporations. It is critical that this Court understand the very real difference in most Alaska locales between the local tribal organization and the local of ANCSA corporation, where there has been no ANCSA § 19(b) election followed by a conveyance of land ownership to the tribe. In illustration, this brief contrasts Shee Atika's membership with that of the present local tribal entity for Sitka, the Sitka Tribe of Alaska.[8] Shee Atika has never made a § 19(b) election, and indeed, could not, because there was never a reserve for the Natives of Sitka. Moreover, Shee Atika has never conveyed ownership of its ANCSA lands to the Sitka Tribe of Alaska or any other tribal entity. In other words, in Shee Atika's case, it is the ANCSA corporation and *not* the tribe which owns the ANCSA lands.

A. Summary of Differences Between Enrollment and Membership in ANCSA Corporations and Local Tribal Organizations.

Since 1936 Alaska Native groups have been permitted by § 16 of the Indian Reorganization Act ("IRA")[9] to organize to receive federal benefits. Although the IRA was not applicable at its 1934 enactment to what was then the Territory of Alaska, this was altered two years later by the Alaska Native Reorganization Act of 1936.[10] The relevant language of both § 16 of the IRA[11] and the Alaska Native Reorganization Act of 1936 required residency within a defined locale as a precondition to organization under federal law. In relevant part, § 1 of the Alaska Native Reorganization Act permits:

> * * * groups of Indians in Alaska * * *, but having a common bond of occupation, association, or residence within a well-defined neighborhood, community, or rural district [to] organize * * * to receive charters of incorporation and federal [benefits] * * *.

The Sitka Community Association[12] was formed in 1938 under these provisions for the Alaska Natives residing in the Sitka area. The Constitution for SCA[13] was formally ratified by Sitka-area Natives on October 11, 1938 after approval by the Bureau of Indian Affairs ("BIA") and was not thereafter modified until 1992. This Constitution required Sitka-area residency for membership[14] and provided a highly specific definition of that

[8] Shee Atika is a type of ANCSA corporation known as an "urban corporation" because it was originally organized for an "urban community of Natives." See ANCSA § 3(o), 43 U.S.C. § 1602(o). However, the differences which the text discusses between Shee Atika and the Sitka Tribe of Alaska do not arise from Shee Atika's status as an urban corporation but rather from the shareholder enrollment and stock transfer rules applicable to *all* ANCSA corporations as contrasted with the membership rules applicable to tribal entities.

[9] Act of June 18, 1934, ch. 576, 48 Stat. 984 (1934), codified at 25 U.S.C. § 461 *et seq.*

[10] See § 1 of the Alaska Native Reorganization Act, Pub. L. No. 538, ch. 254, 49 Stat. 1250 (1936), presently codified at 25 U.S.C. § 473a.

[11] Although IRA § 16 was substantially rewritten as part of the Indian Reorganization Act Amendments of 1988, Pub. L. No. 100-581, 102 Stat. 2938 (1988), these 1988 Amendments to IRA § 16 did not affect the requirement of the Alaska Native Reorganization Act quoted in the text that a group of Indians within Alaska must have a common bond of residence "within a well-defined neighborhood" to be eligible to receive a federal charter.

[12] This brief refers to "SCA" to indicate the IRA § 16 organization from its date of formation in 1938 until a new Constitution was approved in January, 1992. Among the changes accomplished by the 1992 Constitution was to rename the organization "Sitka Tribe of Alaska". We use "SCA/STA" to indicate the Sitka-area tribal organization after its 1992 renaming.

[13] A copy of the original SCA Constitution is attached as Appendix A.

[14] See SCA Constitution, Article II, § 1 (original members); SCA Constitution, Article II, § 3 (new members).

residence.[16] Children of tribal members would automatically become members of SCA, provided they continued to reside (ignoring temporary absences) in the Sitka area.[16] Members of other Indian groups could become members of SCA by moving to Sitka and maintaining a permanent residence, regardless of any prior tribal affiliations.[17] Finally, since one had to be an "Indian" to be a member of SCA, it follows that those who were not "Indian" could not be members of SCA.[18]

In 1992, SCA was reconstituted with the approval of the Department of Interior as the Sitka Tribe of Alaska.[19] At the time the revised Constitution and Bylaws for SCA/STA were approved in 1992, the Department of the Interior formally expressed concerns about a number of provisions in the revised Constitution.[20] One of these provisions had sought to include Shee Atika's fee-owned ANCSA surface estate and the subjacent ANCSA subsurface estate owned in fee by Sealaska Corporation[21] as tribal lands of SCA/STA.[22] Another provision had indi-

[15] SCA Constitution, Article II, § 4.

[16] SCA Constitution, Article II, § 3.

[17] *Id.*

[18] SCA Constitution, Article II, § 1.

[19] A copy of the Constitution and Bylaws for the "Sitka Tribe of Alaska" is appended hereto as Appendix B.

[20] A copy of the approval letter (the "Appendix C Approval Letter") from the Department of Interior relative to the revised SCA/STA Constitution is appended hereto as Appendix C.

[21] As the regional corporation for Southeastern Alaska, Sealaska had 15,790 original enrollees. Only about 12% of Sealaska's original enrollees were enrollees to Shee Atika, *i.e.*, Natives with historic ties to Sitka.

[22] See SCA/STA Constitution, Article II. The Department of Interior did *not* approve SCA/STA tribal jurisdiction over Shee Atika's or Sealaska's ANCSA lands, reading the phrase "if any" within Article II to simply limit the jurisdictional reach of SCA/STA to whatever existing law provided. See Appendix C Approval Letter, at page 3.

cated that Sitka-area residency was no longer required for SCA/STA membership.[23]

The requirements for initial enrollment to become an ANCSA shareholder were quite different from enrollment to a tribal organization. ANSCA enrollment was to be based on a census prepared by the Secretary of Interior, stating a roll of all Alaska Natives living on December 18, 1971.[24] In general, Natives were to be enrolled to the region and the village in which they resided on the date of the 1970 census.[25] Natives not "permanently resident" within Alaska on this date were to be enrolled to the regional corporation within Alaska for the region where they met various prioritized criteria such as historic residency,[26] or they could elect to be enrolled to a "Thirteenth Regional Corporation."[27] In any event, the Secretary of Interior also had power to override the foregoing enrollment rules where necessary to avoid hardship or to avoid enrolling persons in a region different from their family members.[28]

Although ANCSA originally required the enrollment process to be completed within two years, difficulties were encountered and Congress eventually extended the deadline until January 2, 1977. Once the Alaska Native roll was complete, no one could be added to such roll except by Act of Congress.[29] Similarly, once the Alaska Native

[23] *See* SCA/STA Constitution, Article III, § 1. In the Appendix C Approval Letter, at page 3, the Department concluded that Sitka-area residence remained a requirement for tribal membership notwithstanding the apparent ambiguity of the SCA/STA Constitution upon this point.

[24] ANCSA § 5(a), 43 U.S.C. § 1604(a).

[25] ANCSA § 5(b), 43 U.S.C. § 1604(b).

[26] ANCSA § 5(b)(1)-(4), 43 U.S.C. § 1604(b)(1)-(4).

[27] ANCSA § 5(c), 43 U.S.C. § 1604(c).

[28] ANCSA § 5(b), 43 U.S.C. § 1604(b).

[29] *See, e.g.*, § 101 of the Admiralty Island National Monument Land Management Act of 1990, Pub. L. No. 101-378, 104 Stat. 468

roll was finalized, a physical relocation would not change a person's shareholder status with a particular village or regional corporation. Again, only an Act of Congress could do that.[80] Thus, children born after December 18, 1971 are not automatically shareholders of either the respective regional or local ANCSA corporation in which their parents own stock.

Moreover, since ANCSA's enactment, ANCSA stock has been freely transferable upon death and Congress has consistently recognized since the passage of ANCSA that at least some persons who were not of Native descent would eventually own stock in ANCSA corporations.[81]

Perhaps not surprisingly, the membership of SCA/STA and the stockholders of Shee Atika has become even more different since 1971. By January, 1992, when SCA/STA's new Constitution was approved by the Department of the Interior, there were apparently 1,374 SCA/STA members who were resident in Sitka.[82] Shee Atika, on the other

(1990), which added twenty named persons to Cook Inlet Region, Inc. (the ANCSA regional corporation for the Anchorage vicinity).

[80] *See, e.g.*, § 12 of Pub. L. No. 102-497, 106 Stat. 3255, 3260 (1992), which permitted two identified persons previously enrolled to Sealaska Corporation (the ANCSA regional corporation for Southeast Alaska) as "at large shareholders", *i.e.*, without accompanying village corporation enrollment, to be reenrolled to the village corporation for the Craig, Alaska area.

[81] For example, ANCSA § 7(h)(2), 43 U.S.C. § 1606(h)(2), as originally enacted provided that until December 18, 1991 ANCSA stock would carry voting rights only if the new stockholder "also is a Native".

[82] Apparently, the roll submitted by SCA/STA as a part of the 1992 Constitutional amendment process included 2,669 persons, only 1,374 of whom were actually stated to be Indian residents of Sitka. As the Appendix C Approval Letter makes clear, all persons on the SCA/STA roll must meet the requirements of the original SCA Constitution by being an Indian resident of Sitka. ("Approval of this amended Constitution with its reference to the October 1991 base roll must not be construed as approving the reformation of

hand, had 1,851 persons originally enrolled to it under ANCSA; by January, 1992, the number of Shee Atika's shareholders had grown to about 1,950,[83] only about half of whom resided in Sitka.

B. Congress Could Have Required Alaska Natives to Incorporate Under Federal Indian Law to Receive the ANCSA Settlement, Thereby Making the Settlement Entities the Same as the Tribe, But Chose Not to Do So.

At the time ANCSA was enacted in 1971, Federal Indian law had, for 35 years,[84] permitted Alaska Natives to incorporate under either IRA § 16 or § 17[85] to receive federal benefits. Such incorporation under federal law would necessarily carry with it federal rules and supervision.[86] This statutory scheme was already in place at the time ANCSA was enacted, and numerous Alaska Native villages[87] had organized under the IRA. *Had*

an organization on a basis other than residence in the neighborhood of Sitka").

[83] Shee Atika presently has about 2,345 shareholders, of whom only 856 are resident in Sitka. Of these 2,345 shareholders, approximately 2,315 are of Native descent and are entitled to exercise voting rights under ANCSA; the balance are not of Native descent and are not eligible to vote.

[84] See note 10 above and accompanying text.

[85] IRA § 16, 25 U.S.C. § 476, permits Indian groups to incorporate under a federally approved Constitution for internal governance. IRA § 17, 25 U.S.C. § 477, permits Indian groups to organize corporations, again under federal law, to conduct for profit business activity. Generally speaking, the § 16 organizations possess sovereignty, and with it, immunity from suit, while the § 17 corporations do not.

[86] *See, e.g.*, 25 C.F.R. Part 81 ("Tribal Reorganization under Federal Statute"); 25 C.F.R. Part 82 ("Petitioning Procedures For Tribes Reorganized Under Federal Statute and Other Organized Tribes").

[87] *See* D. Case, *Alaska Natives and American Law* 444 (Univ. Alaska Press 1984), which indicates that 69 Alaska Native Villages had so organized under the IRA.

Congress wished to continue formal federal supervision over the ANCSA settlement, it could easily have done so by simply requiring Alaska Native groups to incorporate under the existing IRA structure to receive ANCSA benefits.[38] This would have made the entities which received the ANCSA settlement the same as the tribe.

Congress did not require incorporation under the IRA to receive the ANCSA settlement. Instead Congress required Alaska Natives to organize corporations under Alaska *state* law and revoked or modified various provisions of federal Indian law[39] to make those provisions inapplicable to the Alaska Natives. The result is that the local tribal membership is simply different from the persons who own the stock of the local ANCSA corporation.

C. The Local ANCSA Corporation Is Not the Same as the Local Tribal Organization, Because in at Least Some Cases There Are Multiple Local Tribal Organizations.

Yet another reason the local ANCSA corporation cannot be equated with the local tribal organization is that the lands of some local ANCSA corporations are in the vicinity of multiple local tribal organizations. Such an ANCSA corporation would have to have multiple per-

[38] The language of IRA § 17 seems particularly well suited to the task of receiving, operating and disposing of ANCSA settlement lands, since a corporate charter under § 17 grants full power of disposition over the lands and assets which the entity may acquire "and such further powers as may be incidental to the conduct of corporate business * * *".

[39] ANCSA § 18, 43 U.S.C. § 1617 (revoking applicability to Alaska Natives of the Indian General Allotment Act, ch. 119, 24 Stat. 389 (1887)); ANCSA § 19, 43 U.S.C. § 1618 (revoking all reserves set aside by legislation or Executive Order for Alaska Natives except Annette Island Reserve). *See* ANCSA § 2(b), 43 U.S.C. § 1601(b) (ANCSA settlement to be accomplished "without creating a reservation system or lengthy wardship or trusteeship").

sonalities to accommodate all the local tribal organizations. Shee Atika's own ANCSA land ownership demonstrates this.

Shee Atika has significant ANCSA land holdings in the Sitka area, but also owns ANCSA lands 75 miles away from Sitka at Cube Cove, Alaska. The lands at Cube Cove lie much closer in a geographic sense to the communities of Angoon (35 miles away), Hoonah (30 miles away) and Douglas (35 miles away) than to Sitka.[40] Each of these communities has their own local tribal organizations and could arguably assert their own historic claims to sovereignty over some of Shee Atika's ANCSA lands. Moreover, some (but not all) of Shee Atika's shareholders also are members of the Tlingit and Haida Indian Tribes of Alaska, a regional tribal organization headquartered in Juneau, Alaska, with membership throughout Southeast Alaska wherever persons recognized as Tlingit or Haida Indians reside.[41] Because it is a logical impossibility for Shee Atika to be the same as

[40] The proximity of the Cube Cove lands to Angoon led directly to litigation between Angoon and Shee Atika relative to the right of Shee Atika to log at Cube Cove. *City of Angoon, et al., v. Hodel, et al.*, 803 F.2d 1016, 1018 (9th Cir. 1986), *cert. denied*, 484 U.S. 870 (1987); *City of Angoon, et al., v. Marsh, et al.*, 749 F.2d 1413, 1418 (9th Cir. 1984). Shee Atika prevailed in these cases.

[41] The Tlingit and Haida Indian Tribes of Alaska is governed by a Central Council, which was the entity which received payment of the $7,546,053.80 judgment determined by the former Court of Claims in *Tlingit and Haida Indians of Alaska v. United States*, 389 F.2d 778 (1968). See Pub. L. No. 89-130, 79 Stat. 543 (1965), amending Pub. L. No. 152, ch. 275, 49 Stat. 388 (1935). The Central Council is an Indian entity recognized by the United States government. *See, e.g.*, Indian Tribes Recognized as Eligible to Receive Services from the United States, 60 Fed. Reg. 9250 (February 16, 1995). Thus, for purposes of this brief, the Central Council is one more tribal entity which could assert jurisdiction over ANCSA lands in Southeast Alaska, including those of Shee Atika.

each of these multiple tribal organizations, the Ninth Circuit's assumption that a single ANCSA corporation can be equated with a single local tribal organization is incorrect.

D. Congress Has Expressly Recognized in Legislative History That the Local ANCSA Corporations and the Local Tribal Organizations Have Different Memberships and Are Not the Same.

Section 19(a) of ANCSA revoked the then existing reservations in Alaska (other than the Annette Island Reserve). Section 19(b) of ANCSA permitted the ANCSA corporations which were formed for these respective Natives [42] to elect to receive fee title to the lands which had formerly been set aside for their benefit. Klukwan, Inc., the ANCSA corporation for the Village of Klukwan in Southeast Alaska, made a § 19(b) election in 1973, and then discovered that such lands would be of little value due to the fact that the IRA organization for the Village of Klukwan (known as Chilkat, Inc.) had already leased certain of the minerals within the former reserve lands to an unrelated party. Faced with a situation in which the ANCSA corporation and its shareholders would receive no practical value from its ANCSA conveyance, Congress permitted Klukwan, Inc. to rescind its ill advised § 19(b) election in § 9 of the 1976 Amendments to ANCSA.[43] The legislative history of § 9 is telling as to the relationship Congress perceived between this local ANCSA corporation and the local tribal organization:

> A reservation was set aside by the Act of September 2, 1957 for the Chilkat Indian Village which was organized pursuant to the provisions of the Indian Reorganization Act, as amended. The land was near the Village of Klukwan and was an enlargement of an Executive Order reservation. The same Act permitted the IRA corporation to lease minerals underlying the lands for its benefit. This was done.
>
> The Natives of the Klukwan village area voted [under § 19(b)] to retain the former reserve. However, § 19 made such lands, in the hands of the ANCSA corporations, subject to valid existing rights. One such right was the existing iron ore mineral lease by the IRA corporation which remained separate from the ANCSA corporation.
>
> *While all of the members of the IRA corporation are also members of the ANCSA corporation, the reverse is not true. Since the IRA corporation has a vested right to the subsurface of lands and very likely to the surface also, the net effect is that the ANCSA corporation and its shareholders have no real assets whatsoever.* [Emphasis added].[44]

The legislative history of § 9 of the 1976 amendments explained further requirements which were imposed to protect both Klukwan, Inc.'s and Chilkat, Inc.'s respective rights:

> The foregoing provision will not become effective until Klukwan, Inc. quitclaims to Chilkat, Inc. [the IRA corporation] any interest it may have in the former reserve lands which are quieted in Chilkat, Inc. in fee simple.
>
> The Committee adopted an amendment to § 9 which provides that the United States and Klukwan, Inc. must also quitclaim any interest they may have in certain funds earned on the lease of the mineral resources of the former reserve since enactment of the Settlement Act to Chilkat, Inc.[45]

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[42] There were 25 ANCSA corporations which were eligible to make the § 19(b) election; only seven did so. R. Arnold, *Alaska Native Land Claims* 199 (Alaska Native Foundation 1978).

[43] § 9, Pub. L. No. 94-204, 89 Stat. 1147 (1976).

[44] H. Rep. Rept. No. 94-729, 94th Cong., 1st Sess. 29 (1975), *reprinted in* 1975-2 U.S. Code Cong. & Admin. News 2376, 2395-2396.

[45] *Id.*

Had there been an identity of interest between ANSCA corporations and the local tribal organizations, none of the foregoing would have been necessary. That is, it would not have made a difference whether Klukwan, Inc. (the ANCSA corporation) or Chilkat, Inc. (the IRA organization) was the formal owner of the former reserve and the related mineral lease. Yet as the foregoing legislative history expressly recognized, there was not (and is not) an exact identity between the ANCSA corporation and the local tribal organization, since each has different members.

II. ALTHOUGH REACHING THE CORRECT RESULT THAT THE VENETIE LANDS ARE INDIAN COUNTRY, THE NINTH CIRCUIT MAJORITY OPINION INCORRECTLY CONCLUDED THAT THE ANCSA LAND CONVEYANCES ACCOMPLISHED A *PER SE* SET ASIDE OF ALL ANCSA LANDS.

A. The Nativeness of an ANCSA Corporation Does Not Amount to a Set Aside of Its Assets "for" the Local Tribe Since Such Assets Are Held Under State Law Only for the Corporation's Shareholders.

Shee Atika is concerned that the Ninth Circuit's majority opinion will be interpreted as a de facto rule that there is always a federal set aside with regard to ANCSA lands, whether or not those lands are still owned by the ANCSA corporation. Specifically, the majority opinion stated:

> We believe that the village corporations established under ANCSA, while business entities, maintain a distinct Native identity. Accordingly, we conclude that the land set aside for such corporations qualifies as land set aside for Alaska Natives, as such.[46]

[46] 101 F.3d at 1300.

And the Ninth Circuit majority opinion concluded:

> Here, Congress specifically has conferred the land at issue on the Natives by statute [ANCSA]. We hold that this satisfies the set aside requirement.[47]

ANCSA corporations are indeed fundamentally Native in character. Natives do indeed own the vast majority of stock in Shee Atika and its sister ANCSA corporations. Shee Atika submits, however, that the "Nativeness" of an ANCSA corporation does not lead to the conclusion that there is a "set aside" of the ANCSA assets *for the tribe or for the tribal members*. Instead, under the Alaska state corporate law which Congress carefully and repeatedly[48] made applicable to ANCSA corporations, the assets of each ANCSA corporation are owned by that ANCSA corporation and thus indirectly owned (through stock ownership) by its shareholders. If there has been a set aside which ANCSA accomplishes, it is a set aside for

[47] 101 F.3d at 1304.

[48] See ANCSA § 7(d), 43 U.S.C. § 1606(d) (regional corporations are to incorporate "under the laws of Alaska"); ANCSA § 7(h)(2), 43 U.S.C. § 1606(h)(2) (ANCSA shareholders are to have "all rights of a stockholder in a business corporation organized under the laws of the State of Alaska"); ANCSA § 8(a), 43 U.S.C. § 1607(a) (village corporations are to "organize * * * under the laws of [Alaska]" before they can receive benefits under ANCSA); ANCSA § 14(h)(2), 43 U.S.C. § 1613(h)(2) (an Alaska Native group may receive ANCSA benefits "if it incorporates under the laws of Alaska"); ANCSA § 14(h)(3), 43 U.S.C. § 1613(h)(3) (Natives of Sitka, Kodiak, Kenai and Juneau may receive ANCSA benefits "if they incorporate under the laws of Alaska"). *See also* ANCSA § 3(g), (j), (n), and (o), 43 U.S.C. § 1602(g), (j), (n), and (o) (defining regional corporations, village corporations, group corporations and urban corporations, respectively, as corporations "organized under the laws of the State of Alaska"); ANCSA § 3(t), 43 U.S.C. § 1602(t) (defining settlement trust as "a trust established and registered by a ANCSA corporation under the laws of the State of Alaska and operated for the sole benefit of the holders of the corporation's Settlement Common Stock in accordance with § 39 [43 U.S.C. § 1629e] and the laws of the State of Alaska.")

ANCSA shareholders, and not a set aside for the tribe or for tribal members as such.[49]

The Ninth Circuit majority opinion thus misreads the import of ANCSA § 3(j), which defines a "village corporation" as holding the ANCSA settlement "for and on behalf of a Native village." The Ninth Circuit majority opinion construes this language as essentially creating a quasi-trust relationship with the Native corporation as fiduciary for the historic Native village. However, incorporation under state law (as ANCSA plainly requires) places the Native corporation in a trust relationship *only with its own shareholders*. The Native corporation cannot simultaneously be a fiduciary "for and on behalf of a Native village" and for and on behalf of its own shareholders.

When ANCSA is viewed as a consistent whole, and in particular its plain requirement of organization under Alaska state corporate law, it becomes clear that the better reading of the "for and on behalf of" language of ANCSA § 3(j) is that the Native village was merely the geographic unit for determining eligibility for initial ANCSA enrollment. See ANCSA § 11(b), 43 U.S.C. § 1610(b) (listing Villages other than those in Southeast Alaska eligible for ANCSA incorporation); ANCSA § 16(a), 43 U.S.C. § 1615(a) (listing Villages in Southeast Alaska eligible for ANCSA incorporation). Once the ANCSA corporations were formed and the settlement accomplished, ownership of the ANCSA corporate stock became the prerequisite for receiving the benefit of the ANCSA settle-

[49] There is another reason the Ninth Circuit majority's treatment of the ANCSA land conveyances as a set aside under Indian law is incorrect. The notion of a "set aside" for federal Indian law purposes is best analogized to a "dedication" of land with an element of permanence to that dedication. ANCSA accomplishes no *permanent* dedication of land for Native purposes because ANCSA corporations are as free as any other private owners to dispose of their lands.

ment, not membership in a tribe or residence within the Native village.

B. Despite Repeated Exertions of State Authority Over ANSCA Corporations, Congress Has Never Evidenced an Intent That Alaska State Law Does Not Generally Control ANCSA Corporations.

At the time ANCSA was being considered, Congress expressly recognized that it was making ANCSA corporations subject, on a day to day basis, to Alaska state law and that the State of Alaska might be unduly hostile to Native interests being incorporated under state law. Early drafts of ANCSA contained express prophylactic provisions to restrict the ability of the State of Alaska to legislate regarding ANCSA corporations. These provisions were largely dropped from the final ANCSA legislation in the Conference Committee. As the Conference Report explained:

> The Senate Amendment contained specific language in a number of sections which dealt with conflict of laws questions between the [ANCSA] Act and State Corporation law. This potential problem is dealt with in subsection 7(p) of the conference report which provides that the provisions of sections 7 and 8 prevail in the event of any conflict.
>
> The conference committee considered, but decided not to adopt, language from the Senate amendment to guard against any special State legislation which might impair the activities and economic viability of the Corporations established by the conference report. It was the conference committee's conclusion that the State would deal fairly in all respects with ANCSA corporations.[50]

[50] Conf. Rept. 92-746, 92nd Cong., 1st Sess. 42, *reprinted in* 1971-2 U.S. Code Cong. & Admin. News 2247, 2255.

Within 5 months of ANCSA's passage the Alaska Legislature adopted legislation to implement ANCSA.[51]

These provisions included A.S. § 22.10.020 (granting exclusive jurisdiction to the Alaska state courts to decide questions of ANCSA stock ownership incident to a divorce or child custody proceeding),[52] A.S. § 13.16.705 (authorizing a simplified affidavit procedure enforceable through state court to accomplish ANCSA stock transfers on death),[53] and A.S. § 45.60.016 (now A.S. § 13.46.085, designating persons to automatically serve as custodians of minor ANCSA stockholders and granting jurisdiction to Alaska state courts to vary that priority).[54]

Congress did not pass legislation to overrule the 1972 Alaska state implementing legislation. Indeed, when Congress amended ANCSA in 1976 to expressly exempt

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[51] Act of May 18, 1972, Chapter 70, Alaska Session Laws of 1972, a copy of which is attached as Appendix D.

[52] The validity of A.S. § 22.10.020 has been affirmed by the Alaska Supreme Court in *Calista Corporation v. DeYoung*, 562 P.2d 338 (Alaska 1977). By contrast, it is the tribe and not the state which has jurisdiction to decide the domestic relations of its members. *See generally Fisher v. District Court*, 424 U.S. 382 (1976); *United States v. Quiver*, 241 U.S. 602 (1916); *Conroy v. Conroy*, 575 F.2d 175 (8th Cir. 1978); Indian Child Welfare Act ("ICWA"), Pub. L. No. 95-608, 92 Stat. 3069, codified at 25 U.S.C. §§ 1901 *et seq.* Even after a valid tribal decision, the BIA must approve the transfer of restricted trust property. See 25 C.F.R. §§ 152.17-152.25.

[53] With regard to death transfers of restricted Indian lands or trust property, it is fundamentally clear that it is the BIA, and not the state courts, which has the exclusive jurisdiction to decide ownership upon the death of a tribal member. See Pub. L. No. 313, ch. 431, 36 Stat. 855 (1910), codified at 25 U.S.C. § 372 *et seq.* The procedures applicable to such federal determinations are set forth at 43 C.F.R. §§ 4.200 *et seq.* *See also Standing Bear's Estate v. Belcourt, Mont.*, 631 P.2d 285 (Mont. 1981).

[54] ICWA, *supra* note 52, grants exclusive jurisdiction to the tribe to decide such issues as to tribal members and children who may be tribal members.

ANCSA corporations from the reach of *federal* securities law it did so in part on an express recognition that Alaska *state* securities laws would govern.[55] By contrast, voting within tribal organizations is subject to federal oversight by the BIA to assure fair elections.[56]

Many ANCSA corporations received substantial amounts of timber as a part of the ANCSA settlement. ANCSA corporations are free to harvest that timber without federal controls, subject only to Alaska state law.[57] By federal statute, tribal and other restricted Indian timber must be managed by the federal government in a *trustee* capacity.[58]

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[55] § 3, Pub. L. No. 94-204, 89 Stat. 1147 (1976). *See* H. Rep. Rept. No. 94-729, 94th Cong., 1st Sess. 17-21 (1975), *reprinted in* 1975-2 U.S. Code Cong. & Admin. News 2376, 2383-2387. Thus, shareholder voting at ANCSA corporations has long been subject to state rules which prohibit "materially false and misleading statements in proxy solicitations". *Brown v. Ward*, 593 P.2d 247 (Alaska 1979); A.S. § 45.55.139 (requiring any ANCSA corporation with more than 500 shareholders to file proxy solicitations with Alaska state regulators); A.S. § 45.55.160 (prohibiting any materially false solicitations in filed materials); 3 Alaska Administrative Code (AAC) 08.305 *et seq.* (imposing various requirements for proxy solicitation relative to ANCSA corporations having more than 500 shareholders).

[56] See 25 U.S.C. § 476; 25 C.F.R. Parts 81 and 82, supra note 36. To the extent that rules beyond those promulgated by the BIA are necessary for tribal elections, it is the tribal organization itself which sets the election rules as a matter of internal governance.

[57] *See Alaska* State Forest Practices Act, A.S. §§ 41.17.010 *et seq.* and related regulations at 11 A.A.C. §§ 95,185 *et seq.* Although § 22(k) of ANCSA, 43 U.S.C. § 1621(k), imposed limited restrictions on the initial timber harvest (such as a limitation on timber export), those restrictions have long since lapsed. *See generally City of Angoon, et al. v. Hodel, et al.*, 803 F.2d 1016, 1025-1027 (9th Cir. 1986), *cert. denied*, 484 U.S. 870 (1987).

[58] See, e.g., 25 U.S.C. § 406 (sale of timber on lands held under trust); 25 U.S.C. § 407 (sale of timber on unallotted lands); 25

Further examples of how Alaska state law controls ANCSA corporations on a day to day basis rather than federal law add nothing to the basic proposition. Congress has seen fit to amend ANCSA no less than 17 times [59] since the original enactment in 1971. None of these later enactments have eroded the rule of state governance of ANCSA corporations.

Shee Atika recognizes that the existence of some state regulation is not *per se* inconsistent with the existence of Indian Country. However, when one contrasts the wide range of state regulation which Congress has mandated for ANCSA corporations and their assets against the minimal role of the federal government in the ANCSA corporations' day to day affairs, it seems obvious that Congress did not intend that ANCSA lands which are still owned by the ANCSA corporation to be Indian Country.

The Ninth Circuit majority opinion finds support for its conclusion that Indian Country exists as to ANCSA lands from a statement within the 1988 Amendments to

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U.S.C. § 466 (sustained-yield management of forests); 25 U.S.C. § 162a (investment of funds of tribe and individual allottees); 25 U.S.C. §§ 318a, 323-325 (roads and rights-of-way); 25 U.S.C. §§ 349, 372 (issuance of patents to allottees or heirs found to be capable of managing their affairs). *See generally United States v. Mitchell*, 445 U.S. 535 (1980).

[59] *See, e.g.*, Pub. L. No. 94-204, 89 Stat. 1145 (1976); Pub. L. No. 94-273, 90 Stat. 375 (1976); Pub. L. No. 94-456, 90 Stat. 1934 (1976); Pub. L. No. 95-178, 91 Stat. 1369 (1977); Pub. L. No. 96-55, 93 Stat. 386 (1979); Pub. L. No. 96-311, 94 Stat. 947 (1980); Pub. L. No. 96-487, 94 Stat. 2371 (1980); Pub. L. No. 97-468, 96 Stat. 2543 (1982); Pub. L. No. 99-500, 100 Stat. 1783 (1986); Pub. L. No. 99-591, 100 Stat. 3341 (1986); Pub. L. No. 100-241, 101 Stat. 1788 (1988); Pub. L. No. 101-511, 104 Stat. 1856 (1990); Pub. L. No. 102-154, 105 Stat. 990 (1991); Pub. L. No. 102-415, 106 Stat. 2113 (1992); Pub. L. No. 102-497, 106 Stat. 3255 (1992); Pub. L. No. 103-204, 107 Stat. 2413 (1993); Pub. L. No. 104-42, 109 Stat. 353 (1995).

ANCSA, Pub. L. No. 100-241, 101 Stat. 1788 (1988), that such amendments are "neutral" on the question of Indian Country status. The problems with trying to use legislation which was enacted sixteen years after ANCSA became law to divine the intent of the original ANCSA are obvious. The real question is what was the intent behind ANCSA in 1971 based on the plain words which Congress actually employed in 1971. In this regard, ANCSA declares that the ANCSA settlement was to be accomplished " * * * without creating a reservation system or lengthy wardship or trusteeship * * *," (ANCSA § 2(b), 43 U.S.C. § 1601(b)) and contains provisions which revoked Indian allotment and Indian reservation authority in Alaska (ANCSA § 18(a) and § 19(a), 43 U.S.C. § 1617(a) and § 1618(a)). It is difficult to square these provisions with a conclusion that ANCSA lands were nonetheless intended to be Indian Country when those lands are still owned by the ANCSA corporation.

The Ninth Circuit majority opinion also found it significant that Congress has repeatedly included ANCSA corporate lands within the scope of various statutory Indian programs. However, what is significant in the context of this case is not that ANCSA lands are eligible for these Indian programs. Instead, what is significant is the *manner* in which Congress made the ANCSA lands eligible because this demonstrates that Congress has never thought ANCSA corporate lands meet the statutory definition of Indian Country under 18 U.S.C. § 1151. The lands eligible for these statutory Indian programs include those lands which are defined as Indian Country pursuant to 18 U.S.C. § 1151, but when Congress has made ANCSA corporate lands eligible for these programs, it has done so by including *additional* language which references the ANCSA corporate lands directly. Had Congress really believed that ANCSA corporate lands were already Indian Country under 18 U.S.C. § 1151, a cross reference to 18 U.S.C. § 1151 alone would have been sufficient.

For example, § 168(j)(6) of the Internal Revenue Code [60] permits accelerated depreciation of structures upon certain Indian lands. In defining the lands eligible for this tax benefit, Congress referenced § 4(10) of the Indian Child Welfare Act, [61] which ultimately cross references to 18 U.S.C. § 1151. However, Congress also included a further express cross reference within § 168(j)(6) to § 3(d) of the Indian Financing Act of 1974 [62] thereby including ANCSA corporate lands *in their status as ANCSA corporate lands*. The implication is obvious: Congress does not believe that ANCSA corporate lands are within the 18 U.S.C. § 1151 definition of Indian Country.[63] It is plain that Congress intends a distinction between the Indian Country lands under 18 U.S.C. § 1151 and the ANCSA corporate lands, and such a distinction is well within the plenary power of Congress relative to Indian affairs.

Thus, whether the test for Indian Country status is ultimately a six part test or a two part test [64] is irrelevant when ANCSA lands are still owned by an ANCSA corporation, given the fact that the local ANCSA corporation and the local tribe are not the same. ANCSA land which

[60] 26 U.S.C. § 168(j)(6).

[61] 25 U.S.C. § 1903(10).

[62] 25 U.S.C. § 1452(d). Indeed, this definitional statute expressly contrasts "Indian reservations" and "Indian allotments" with "land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act".

[63] Congress might also have amended 18 U.S.C. § 1151 itself to expressly make the ANCSA corporate lands Indian Country. It has not done this either.

[64] The Ninth Circuit's majority opinion indicates that a six-point test is to be employed in determining Indian Country status. 101 F.3d at 1311. But the majority opinion also indicates that the set aside and superintendence tests are the "overarching prerequisites to a dependent Indian community". Shee Atika wonders how significant the six-part analysis really is. *Id.*

is still owned by an ANCSA corporation is not "set aside" for the local tribe or the tribal members, and ANCSA land which is still owned by an ANCSA corporation is not Indian Country.

III. THERE WILL BE SUBSTANTIAL IMPACTS ON SHEE ATIKA AND OTHER ANCSA CORPORATIONS WHICH WERE UNINTENDED BY CONGRESS IF THIS COURT DOES NOT SUBSTANTIALLY MODIFY THE DECISION BELOW.

As Judge Fernandez noted in his concurrence below,[65] the logical conclusion of the Ninth Circuit's majority opinion is that a tribal organization may assert jurisdiction over ANCSA land even when it is still owned by the ANCSA corporation. Other portions of this brief discuss why the Ninth Circuit majority opinion is fundamentally inconsistent with ANCSA and why this Court should make it clear that ANCSA land which is still owned by an ANCSA corporation is not Indian Country, even though Indian Country status is appropriate for the ANCSA lands now owned by Venetie.

This portion of our brief discusses the impact the Ninth Circuit majority opinion may have on Shee Atika and other ANCSA corporations if the Ninth Circuit majority opinion is not substantially modified to eliminate the inference that ANCSA land which is still owned by an ANCSA corporation may be Indian Country. Shee Atika does not offer these examples to litigate in advance whether SCA/STA has these or any other rights *vis a vis* Shee Atika and Sealaska. Rather, these examples highlight the potential problems which will be present from a broad holding that ANCSA lands which are still owned by an ANCSA corporation are Indian Country and subject to the jurisdiction of whatever local tribal organization(s) may assert themselves in the vicinity of ANCSA

[65] 101 F.3d at 1320-1323 (Fernandez, J., concurring).

land. The horrible outcomes Judge Fernandez anticipates are not exaggerated.

As this brief has already indicated, SCA/STA has adopted a constitution that purports to define the geographical limits of its territorial jurisdiction as including Shee Atika's fee-owned ANCSA surface estate and Sealaska's fee-owned ANCSA subsurface estate.[66]

A first potential impact is that of taxation. Under SCA/STA's constitution, SCA/STA may impose taxation upon a vote of the Tribal Council and the confirming vote of SCA/STA's membership.[67] If Shee Atika's ANCSA lands are Indian Country, SCA/STA could assert the ability to tax activities upon those lands (such as timber harvest). As Chief Justice Marshall wrote long ago, the power to tax involves the power to destroy. *McCulloch v. Maryland*, 4 Wheaton 316, 431 (1819).

The SCA/Constitution permits the Tribal Council to impose land use regulations upon tribal lands, to prevent their sale or other disposition, and/or to make such dispositions of those tribal lands as may be appropriate.[68] "[T]ribal lands" arguably include the Shee Atika ANCSA surface estate and Sealaska ANCSA subsurface estate if those lands are a part of Indian Country. Yet Congress expressly mandated[69] the conveyance of the specific Cube Cove timberlands to Shee Atika in satisfaction of Shee Atika's rights under ANCSA § 14(h)(3), 43 U.S.C. § 1613(h)(3), and then decreed in *further* special legislation[70] that the specific ANCSA conveyance to Shee

[66] SCA/STA Constitution, Article II (attached as Appendix B).

[67] SCA/STA Constitution, Article VII, § 1(c).

[68] SCA/STA Constitution, Article VII, § 1(h), 1(q) and 1(i).

[69] § 506(c) of the Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371, 2409 (1980).

[70] § 315 of the Interior Appropriation Act, Pub. L. No. 97-394, 96 Stat. 1998 (1983). *See generally City of Angoon, et al., v. Hodel, et al.*, 803 F.2d 1016, 1018 (9th Cir. 1986), *cert. denied*, 484 U.S. 870 (1987).

Atika was intended as a fee conveyance, "confirmed * * * in all respects". *Three* times the Ninth Circuit has concluded that the intent of Congress was that Shee Atika's Cube Cove lands be available to it for the harvesting of the timber.[71] It seems unlikely, when this history of Shee Atika is understood, that Congress nonetheless wished SCA/STA to have the ability to restrict or even terminate Shee Atika's ability to harvest its ANCSA lands.

Moreover, SCA/STA's Constitution expressly permits the Tribal Council to make assignments of land and water areas "of the Tribe" to SCA/STA's members.[72] Alaska state corporate law permits Shee Atika and Sealaska to distribute their respective ANCSA land only to their own respective shareholders. ANCSA permits the distribution of land by an ANCSA corporation, but only (i) to the ANCSA corporation's own shareholders as a part of a homesite lot program[73] or (ii) to a settlement trust[74] so long as the "sole beneficiaries" of that settlement trust are the shareholders of the ANCSA corporation.[75] ANCSA does not even remotely authorize the assignment of ANCSA land to tribal members in their status as tribal members.

[71] *Shee Atika v. Sealaska Corporation*, 39 F.3d 247, 249-250 (9th Cir. 1994) (Shee Atika's Cube Cove land is valuable principally as a source of timber and Shee Atika has the right to obtain subsurface materials necessary to harvest that timber); *City of Angoon, et al., v. Hodel, et al.*, supra note 70 ("Congress intended Shee Atika to have the opportunity to harvest timber on the Cube Cove land"); *City of Angoon, et al., v. Marsh, et al.*, 749 F.2d 1413, 1418 (9th Cir. 1984) ("inconceivable" that Congress would have denied Shee Atika the timber harvest which was the only real economic use of the Cube Cove lands it received under ANCSA).

[72] SCA/STA Constitution, Article VII, § 1(j).

[73] ANCSA § 21(j), 43 U.S.C. § 1620(j).

[74] ANCSA § 39, 43 U.S.C. § 1629e.

[75] ANCSA § 3(t), 43 U.S.C. § 1602(t).

There is yet another reason that tribal control of ANCSA lands cannot be squared with the purposes of ANCSA. The courts have long recognized that revenue sharing under § 7(i) of ANCSA, 43 U.S.C. § 1606(i), is "one of ANCSA's most important provisions." [76] Under this section, ANCSA regional corporations must redistribute 70% of their revenues from timber and subsurface resources among all the regional corporations. The regional corporations, in turn, are obligated to further redistribute 50% of this shared revenue among certain of their own shareholders and the local village corporations in their region.[77] If a local tribal organization has the power (as SCA/STA claims) to tax a regional corporation's ANCSA lands, restrict use of those lands, or assign those lands to the tribe's members, some or all of the revenues from those lands will not be available for revenue sharing under ANCSA § 7(i). This will defeat in no uncertain terms "ANCSA's important goal of ensuring that revenues derived from the § 7(i) resources be shared among all Natives", and not just the Natives within a particular locale.[78]

CONCLUSION

Venetie has sovereignty and this court should conclude on the unique facts of this case that the ANCSA lands which Venetie now owns are Indian Country. By contrast, ANCSA lands which are still owned by the ANCSA corporation are not Indian Country. Whether the test for Indian Country status is ultimately a six part test or a two

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[76] *Koniag, Inc. v. Koncor Forest Resources*, 39 F.3d 991, 998 (9th Cir. 1994). *See also Tyonek Native Corporation v. Cook Inlet Region, Inc.*, 853 F.2d 727 (9th Cir. 1988); *Chugach Natives, Inc. v. Doyon Ltd.*, 588 F.2d 723 (9th Cir. 1978).

[77] See ANCSA § 7(j) and (m), 43 U.S.C. § 1606(j) and (m). *See generally Koniag, Inc. v. Koncor Forest Resources, supra*, 39 F.3d 991, 999 (9th Cir. 1994).

[78] *Koniag, Inc. v. Koncor Forest Resources*, 39 F.3d at 998-999.

part test is irrelevant when ANCSA lands are still owned by an ANCSA corporation, because the local ANCSA corporation and the local tribe are not the same. ANCSA lands which are still owned by an ANCSA corporation are not "set aside" for the local tribe or the tribal members.

There are numerous reasons why the local ANCSA corporation is not the same as the local tribal organization. Congress in the exercise of its plenary authority to regulate affairs of Indians has provided a regime whereby Alaska tribal entities have different members from ANCSA corporations, with different laws to apply to each.

Congress could have made the local ANCSA corporation the alter ego of the local tribal organization, perhaps by requiring incorporation under the IRA as a precondition to receiving the ANCSA settlement. But since Congress did not do this, this Court should conclude that ANCSA lands which are still owned by the ANCSA corporation are not Indian Country, and hold that Venetie's lands are Indian Country only because Venetie has acquired ownership of its former reserve following an ANCSA § 19(b) election.

Respectfully submitted,

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APPENDICES

APPENDIX A

DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

CONSTITUTION AND BY-LAWS
OF THE
SITKA COMMUNITY ASSOCIATION
TERRITORY OF ALASKA

RATIFIED OCTOBER 11, 1938

[DOI Logo]

CONSTITUTION AND BY-LAWS OF THE SITKA COMMUNITY ASSOCIATION, TERRITORY OF ALASKA

PREAMBLE

We, a group of Indians having a common bond of residence in the neighborhood of Sitka, Territory of Alaska, in order to promote our welfare through the development and operation of social and economic enterprises, do establish this Constitution and By-laws in accordance with, and by authority of, the Act of Congress of June 18, 1934 (48 Stat. 984), as amended by the acts of June 15, 1935 (49 Stat. 378), and May 1, 1936 (49 Stat. 1250).

ARTICLE I

SECTION 1. The name of this organization shall be Sitka Community Association, Territory of Alaska, hereinafter called the Association.

ARTICLE II—MEMBERSHIP

SECTION 1. *Original Members.*—All persons whose names appear on the census roll, prepared in accordance with the Instructions of the Secretary of the Interior for Organization in Alaska, being all the Indians residing in the neighborhood of Sitka, shall be members of this Association.

SEC. 2. *Loss of Membership.*—(*a*) Any member may give up his membership at any time upon written notice to the Secretary of the Council, in which case he shall no longer share in the activities and benefits of this Association, but he may be reinstated as a member upon written application filed with the Secretary of the Council and a majority vote of the members of the Association present at any regular meeting.

(*b*) Any member who, after notice and an opportunity to present his defense, is found guilty by the Association

of fraud or misconduct in his relations with the Association or of working deliberately against the interests of the Association, may be expelled by a two-thirds vote of the members present at any regular or special meeting. A person so expelled may be reinstated as a member upon written application filed with the Secretary of the Council and two-thirds vote of the membership present at any regular meeting.

SEC. 3. *New Members.*—(*a*) All children of any member who are residents of the town of Sitka shall be members of this Association.

(*b*) Any Indian who becomes a resident of the neighborhood of Sitka may become a member of this Association after maintaining a permanent residence.

SEC. 4. *Definition of Residence*—(*a*) Any person shall be considered a resident of the neighborhood of Sitka who maintains a home within the incorporated limits of the town of Sitka or within the areas now known as "Indian Possessions" and "Cottage Settlement", or in any area in the vicinity of Sitka which may be reserved or otherwise acquired for the use of this Community association. Temporary absences shall not constitute loss of residence.

SEC. 5. *Rule-making Power.*—The Association may make rules and regulations to carry out this article.

ARTICLE III—THE COUNCIL

SECTION 1. *Composition and Functions.*—(*a*) There shall be a Council composed of the President and six other members elected by the Association.

(*b*) The Council shall represent the Association in all its undertakings and shall exercise the powers of the Association enumerated in this Constitution. It shall be the duty of the Council to report its activities and the state of the affairs of the Association at each regular meeting

of the Association, at which time the members may outline the policies to be followed by the Council.

SEC. 2. *Election.*—(*a*) Members of the Council shall be elected by secret ballot on the first Thursday after the third Monday in April.

(*b*) At the regular meeting of the Association on the third Monday in April the members of the Association shall make nominations and determine the candidates for election.

(*c*) The Council shall organize itself within 30 days after each annual election date by electing from within its membership a Vice President, and from within or without, a Secretary, a Treasurer, and such other officers as it may deem necessary. Officers elected from without the Council shall not vote therein.

(*d*) Rules and regulations governing the conduct of elections may be adopted by the Association at any regular or special meeting.

SEC. 3. *Tenure of Office.*—(*a*) The term of office of each elected officer shall expire when his successor is elected and qualified.

(*b*) The President of the Council shall be elected annually and shall serve for a term of one year.

(*c*) Each of the other members of the Council shall be elected to serve for a term of two years.

(*d*) The first election of the Community Council shall be called and held under the direction of the Principal Teacher at Sitka within three months after the ratification of this Constitution. The members of the Council so elected, other than the President, shall divide themselves into two equal groups "A" and "B" by drawing lots, whereupon the term of office of those in group "A", and of the first President, shall terminate on the regular election date of the second April following, and the term of

office of those in group "B" shall terminate on the regular election date of the third April following. Thereafter, each member of the Council, other than the President, shall serve two years.

ARTICLE IV—POWERS OF THE ASSOCIATION

SECTION 1. The Association shall have power:

(*a*) To negotiate with the Federal and Territorial Governments on behalf of the Association and to advise and consult with representatives of the Interior Department on all activities of the Department that may affect the Association.

(*b*) To manage and control all its economic affairs and enterprises in accordance with the charter which may be issued under the Act of June 18, 1934.

(*c*) To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior.

(*d*) To levy dues, fees, and assessments, for Association purposes, on its members and to provide for their collection and for their enforcement through the deprivation of membership privileges. No such dues, fees, or assessments shall be laid except by resolutions of the membership adopted at any regular or special membership meeting.

(*e*) To organize or to charter associations of its members for economic purposes and to regulate the same.

(*f*) To prevent the sale, disposition, lease, or encumbrance of any land, interest in land or waters, or other assets of the Association without its consent.

(*g*) To make assignments of land or water areas of the Association for use and occupancy to members of the Association in accordance with the customs of the Indians forming this Association or with the regulations of the Association.

(*h*) To protect the natural resources of the Association.

(*i*) To preserve and cultivate the arts, crafts and culture of the Indians of this community and their customs not in conflict with Territorial law.

ARTICLE V—BILL OF RIGHTS

SECTION 1. The Council shall not restrict or in any way abridge the rights of the members of the Association guaranteed under the Constitution of the United States but it shall be its duty to see that the full constitutional rights thereof are maintained and preserved.

SEC. 2. All members of the Association in good standing shall be accorded equal right and opportunity to participate and enjoy the resources, property, and benefits of this Organization.

SEC. 3. All members of this Association over the age of 21 years shall have the right to vote.

ARTICLE VI—CHANGE OF OFFICERS

SECTION 1. *Forfeiture of Office, Removal and Recall.*—(*a*) Any member of the Council or other officer of the Association who is convicted of a felony or any other offense involving dishonesty shall forfeit his office.

(*b*) Any member of the Council who is absent from the regular meetings of the Council for the period of three months without cause or excuse, may have his seat declared vacant by the Council after notice and an opportunity to be heard.

(*c*) Upon a petition signed by one-third of the council members of the Association asking the recall of any member of the Council, the Council shall call a special meeting of the Association to vote upon his recall. If the council member is recalled, the Association members shall proceed to elect his successor to fill the unexpired term.

SEC. 2. *Filling Vavancies.*—If the office of the Council member is vacant for any reason, the Council may appoint a successor to serve until the next regular meeting of the Association at which time a member shall be elected to fill the unexpired term.

ARTICLE VII—FEDERATION

The Council may for the purpose of forming a federation or union with other organizations of like character appoint a committee to meet with such other organizations and submit its findings to the said Council for appropriate action.

ARTICLE VIII—AMENDMENTS

Amendments to this Constitution and By-laws may be proposed by resolution of the Council or of the Association which amendments, if approved by the Secretary of the Interior, shall be effective when ratified by a majority vote of the adult members of the Association voting at an election called for the purpose by the Secretary of the Interior, provided that at least 30 per cent of those entitled to vote shall vote in such election.

BY-LAWS OF THE SITKA COMMUNITY ASSOCIATION, TERRITORY OF ALASKA

ARTICLE I—DUTIES OF OFFICERS

SECTION 1. The President of the Council shall preside over all meetings of the Association and of the Council, exercising the usual duties of chairman and any others delegated to him. He may vote in Council meetings only in case of a tie or where the vote is by ballot.

SEC. 2. The Vice President shall act as president in the absence or disability of the President.

SEC. 3. The Secretary of the Council shall conduct all correspondence and keep a complete and accurate record of all business transacted at Council or Association meetings. It shall be his duty to give promptly to the Principal Teacher at Sitka for inspection and forwarding to the Juneau Office of the Office of Indian Affairs two copies of all minutes of all regular and special meetings of the Council or Association.

The Secretary shall record all rules, regulation, and resolutions in appropriate books, indexing the same and assigning a short title, and may publish the same for the information of the Association.

The Secretary shall notify each person of his election to an office of the Association within five days thereof.

SEC. 4. The Treasurer of the Council shall accept, receive, receipt for, preserve and safeguard all funds in the custody of the Council, whether Association funds or other funds for which the Council is responsible. He shall deposit all such funds in such banks or elsewhere as directed by the Council and, when a Federal Charter is adopted, in accordance with such charter. He shall make and preserve a faithful record of such funds and shall report to the Council all receipts and expenditures and the amount and nature of all funds in his possession or custody. He shall not pay out or authorize disbursement of any funds for which he is responsible except upon written authorization of the Council.

The books and records of the Treasurer shall be audited at least once each year by a competent auditor employed by the Council and acceptable to the Juneau Office of the Office of Indian Affairs, and at such other times as the Council shall direct. He shall give two copies of the auditor's report and, once each month, two copies of his trial balance to the Principal Teacher at Sitka for inspection and forwarding to the Juneau Office.

The Treasurer shall be required at the request of the Council or the Commissioner of Indian Affairs to give bond satisfactory to the Council and the Commissioner. The Treasurer shall be present at all special or regular meetings of the Council. The Treasurer may with the advice and consent of the Council appoint assistants.

SEC. 5. The duties of all appointive officers or agents shall be clearly defined by a resolution of the Council at the time of their appointment.

SEC. 6. All accounts, records, books and minutes of the Association shall be subject to examination by members of the Association and by the Commissioner of Indian Affairs or his authorized representative.

ARTICLE II—QUALIFICATIONS OF OFFICERS

SECTION 1. No person may be a candidate for any elective office unless he has the qualifications of a voter.

ARTICLE III—INSTALLATION OF OFFICERS

Each person appointed or elected to an office shall subscribe to the following oath of office before entering upon the duties thereof:

"I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies; that I will carry out faithfully and impartially the duties of my office as—— _____ to the best of my ability; that I will promote and protect the best interests of the Association, in accordance with this Constitution and By-laws."

ARTICLE IV—TIME AND PLACE OF COUNCIL MEETINGS AND ORDER OF BUSINESS

SECTION 1. The Council shall meet on the first Monday of each month at 7:30 p.m., unless otherwise ordered by resolution, and may meet at such other times as may be voted by the Council. The President or three of the Coun-

cil members may call a special meeting on two days' actual notice to the Council members.

SEC. 2. Unless otherwise ordered by resolution of the Council meetings shall be held at the principal place of business of the Association, which place shall be such location within the town of Sitka or Native Village as may be determined by the Association by resolution.

SEC. 3. A number equal to one-half of the membership of the Council exclusive of the President shall constitute a quorum.

SEC. 4. The following shall be the order of business unless changed by or with the consent of the council, namely:

Call to order by the President;
Roll call;
Announcement of quorum;
Reading the minutes of the last meeting;
Correction or approval of the minutes of last meeting;
Treasurer's report;
Report of Committees;
Unfinished business;
New business;
Adjournment.

SEC. 5. The Council may adopt regulations governing its procedure, and in the absence thereof, Robert's Rules of Order shall govern.

SEC. 6. Every resolution, after the explanatory clauses, shall begin with the words: "*Be it resolved by the Council of the Sitka Community Association.*"

ARTICLE V—MEETINGS OF THE ASSOCIATION

SECTION 1. Regular meetings of the Association shall be held twice a year on the first Monday in November and the third Monday in April.

Special meetings may be called at any time by the Council and must be so called upon petition of one-third of the adult members of the Association. For such meetings three days' posted or written notice must be given.

SEC. 2. One-fifth of the adult membership shall constitute a quorum at any meeting.

SEC. 3. Meetings shall be held at the principal place of business unless otherwise ordered by resolution of the Association or otherwise specified in the notice of a special meeting.

ARTICLE VI—DEFINITIONS

SECTION 1. Whenever the term "Principal Teacher at Sitka" is used it shall be understood to mean the Principal Teacher for the Department of the Interior, Office of Indian Affairs, or any successor official representing the Office of Indian Affairs in Sitka.

SEC. 2. Where the masculine pronoun is used in this Constitution and By-laws and other general documents of the Association, it shall be understood to include the feminine.

SEC. 3. The word "adult" means a person who is 21 years of age or over.

ARTICLE VII—RATIFICATION OF CONSTITUTION AND BY-LAWS

This Constitution and By-laws shall be effective from and after the date of its ratification by a majority vote of those entitled to vote who vote at an election called for the purpose by the Secretary of the Interior, provided that at least 30 per cent of those entitled to vote shall vote in such election, such ratification to be formally certified by the Election Board.

The persons entitled to vote are all the adult Indians who are residing in the neighborhood of Sitka, Territory of Alaska, and whose names appear on a roll of such In-

dians compiled under the Instructions of the Secretary of the Interior.

This Constitution and By-laws are herewith approved by the Assistant Secretary of the Interior and submitted for ratification by the group of Indians having a common bond of residence in the neighborhood of Sitka, Territory of Alaska, in a popular referendum called and held under the Instructions of the Secretary of the Interior.

OSCAR L. CHAPMAN,
Assistant Secretary of the Interior.

[SEAL]

WASHINGTON, D.C., *July 13, 1938.*

CERTIFICATION OF ADOPTION

Pursuant to an order, approved July 13, 1938 by the Assistant Secretary of the Interior, the attached Constitution and By-laws was submitted for ratification to the group of Indians having a common bond of residence in the neighborhood of Sitka, Territory of Alaska, and was on October 11, 1938 duly ratified by a vote of 145 for and 3 against, in an election in which over 30 per cent of those entitled to vote cast their ballots, in accordance with section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 084), as amended by the act of June 15, 1935 (49 Stat. 378).

RALPH YOUNG, SR.,
Chairman, Election Board.
LAWRENCE WIDMARK,
Secretary, Election Board.

RAYMOND L. WOLFE,
Government Representative.

APPENDIX B

CONSTITUTION OF THE SITKA TRIBE OF ALASKA

PREAMBLE

We, the citizens of the sovereign Sitka Tribe of Alaska, in order to establish a more perfect tribal government, to preserve and exercise the Tribe's inherent sovereign rights and powers, to provide for our posterity, to conserve tribal, lands and resources, and to establish justice, pursuant to Tlingit tribal law and custom and federal law, make for ourselves this Constitution by authority of the Act of June 18, 1934, (48 Stat. 984) as amended. The Constitution of the Sitka Community Association approved by the Secretary of the Interior on July 13, 1938 is hereby superseded to the extent not in conflict with this Constitution.

ARTICLE I. NAME

The Tribe, formerly known as the Sitka Comunity Association, shall hereafter be known as the "Sitka Tribe of Alaska" a federally recognized sovereign tribe.

ARTICLE II. TERRITORY AND JURISDICTION

The jurisdiction of the Sitka Tribe of Alaska shall extend to all lands constituting the Native Village of Sitka and the areas formerly known as "Indian Possessions" and "Cottage Settlement", and to all surrounding areas of Indian Country, if any, including all customary and traditional use and access areas in the vicinity of Baranof Island, Chichagof and surrounding islands, and all fee lands and allotments and lands owned by Sealaska, Inc. or Shee-Atika, Inc. located therein (the Native corporations established pursuant to the Alaska Native Claims Settlement Act (Pub. L. 92-203) as amended to hold the land and other benefits provided by Congress in partial

compensation for the extinguishment of the Tribe's aboriginal land rights), to the fullest extent permitted by federal and tribal law.

ARTICLE III. CITIZENSHIP

Section 1. *Citizenship.* All persons whose names appear on the official citizenship roll of the Tribe dated October 29, 1991 shall be citizens of the Tribe.

Section 2. *Children of Citizens.* All children born to tribal citizens shall be enrolled in the Tribe.

Section 3. *Loss of Citizenship or Other Rights.* Any tribal citizen shall be deemed to have relinquished his or her citizenship by enrolling in another tribe, and may relinquish his or her citizenship in writing or, after notice and an opportunity to present his defense, may have one or more of his or her citizenship rights (including voting rights or the right to hold elective office) taken away for good cause shown (including being found guilty by the Tribe of fraud or misconduct in his or her relations with the Tribe or of working deliberately against the interests of the Tribe) pursuant to an enrollment ordinance adopted in accordance with the provisions of this Article and upon the affirmative vote of two-thirds of the eligible voters present at a General Citizenship meeting. A person whose citizenship rights have been involuntarily taken away may only have his or her rights reinstated upon the affirmative vote of two-thirds of the eligible voters present at a General Citizenship meeting.

Section 4. *New Citizens.* Any person who has voluntarily relinquished his or her citizenship in the Tribe, and any other person who is a member of (or is eligible for membership in) a Native American tribe, who sets up a permanent home in the vicinity of the Tribe, who renounces in writing his or her membership in any other Tribe, who establishes social or cultural relations with the Tribe, and who agrees to be bound by this Constitution, may be made a tribal citizen upon such terms and conditions as may be established pursuant to an enrollment ordinance adopted in accordance with the provisions of this Article.

Section 5. *Citizenship and Enrollment Rules.* The Tribal Council shall adopt an ordinance establishing rules and procedures for citizenship and enrollment, consistent with the provisions of this Constitution.

ARTICLE IV. GOVERNING BODY

Section 1. *Tribal Council and Officers.* The governing body of the Sitka Tribe of Alaska shall be known as the Sitka Tribal Council. The Tribal Council shall consist of a Chairman and eight (8) other members, all of whom shall be entitled to vote. The nine (9) Council members shall be elected directly by the voters. The Tribal Council shall itself each year elect from its members a Vice-Chairman, a Secretary and such other officers as it may deem appropriate.

Section 2. *Duties of Officers.* The Chairman shall preside at all meetings of the Tribe and of the Tribal Council and shall execute on behalf of the Tribe all contracts, leases or other documents approved by the Tribal Council. The Chairman may vote in all matters except on the matter of the Chairman's removal. The Chairman shall have general supervision of all other officers, employees, agents and committees and shall see that their duties are properly performed. The Chairman shall be the official representative of the Tribe but shall make no financial or other commitment on behalf of the Tribe without the Tribal Council's approval. The Vice-Chairman shall assist the Chairman when called upon to do so and, in the Chairman's absence or disability, shall have all the rights, privileges, duties and responsibilities of the Chairman. The Secretary shall keep the minutes of all Council meetings and shall attest to the enactment of all resolutions and

ordinances. The duties of all other officers shall be specified by the Tribal Council.

Section 3. *Eligibility.* Any citizen of the Tribe thirty (30) years of age or older shall be qualified to seek and hold office on the Tribal Council, provided that he or she has been living within the area described in Article II of this Constitution for at least one (1) year directly preceding the election, unless such right to hold elective office has been taken away pursuant to an enrollment ordinance in accordance with Article III. In any one election a person may only seek to hold one office on the Tribal Council. A Council member who is elected Chairman shall resign his or her office as Council member before entering upon the official duties of Chairman.

Section 4. *Term.* Council members shall be elected by secret ballot. The terms of the Council members other than the Chairman shall be staggered as follows: At the first general election following the adoption of this Constitution, the voters shall elect four (4) Council members for one-year terms (being the Council members elected by least votes), four (4) Council members for two-year terms (being the Council members elected by the most votes), and the Chairman for a two-year term. Thereafter, at each annual general election the voters shall elect four (4) Council members for two-year terms. The voters shall elect the Chairman every two years. Beginning with the first general election following the adoption of this Constitution, each Council member shall serve until his or her successor has been elected and seated. All Council members holding office at the time this Constitution is adopted shall remain in office until the next general election referred to in this Section.

Section 5. *General Meetings.* The Tribal Council shall meet each month on a date, the place to be fixed by action of the Tribal Council, and in such other times and places as may be designated by action in a majority of the Tribal

Council or by the Chairman. The Chairman shall direct that personal notice be provided to each Council member no less than forty-eight (48) hours prior to any meeting. A quorum to transact business shall consist of at least five (5) Council members. To be effective, a majority of the members present shall vote on all motions, resolutions and ordinances. The Tribal Council shall keep a complete and accurate record of all proceedings, including reports of actions taken at every meeting.

Section 6. *Oath of Office.* Before entering upon their official duties, all members of the Tribal Council and all other tribal officers shall take and subscribe to the following oath or affirmation to be administered by a qualified officer:

> "I, _____, do solemnly swear (or affirm) that I will support the Tlingit customs, laws and Constitution of the Sitka Tribe of Alaska, that I will promote and protect the best interests of the Tribe, and that I will faithfully discharge the duties of my office according to the best of my ability."

Section 7. *Forfeiture.* Any member of the Tribal Council who (a) submits a written resignation, (b) is convicted by any competent court of a felony or any other offense involving dishonesty while in office, (c) has his or her citizenship rights taken away, in whole or in part, for good cause shown, pursuant to Article III, Section 3, or (d) is absent from three (3) successive monthly Tribal Council meetings without being excused by the Tribal Council for good cause shown, shall automatically forfeit his or her office and shall be so notified by the Chairman in writing.

Section 8. *Removal.* Any member of the Tribal Council found guilty by the Tribal Council of neglect of duty, gross misconduct in office, or any offense involving dishonesty may be removed from office by the Tribal Council by at least five (5) Tribal Council members voting by

secret ballot, *provided*, that such member shall first be given ten (10) days notice in writing of the charges against him or her and be given an opportunity to answer such charges before the Tribal Council. No member of the Tribal Council shall preside over the meeting at which his or her removal is being considered. All questions of removal under this section shall be resolved by the Tribal Council and the decision of the Tribal Council shall be final.

Section 9. *Recall.* Any member of the Tribal Council may be recalled by the Tribal voters if a valid petition requesting such recall and setting forth the reasons, signed by at least thirty percent (30%) of the eligible voters, is presented to the Tribal Council. The Tribal Council shall within thirty (30) days of receipt of such petition call an election to consider the recall of the named official, such election to be conducted pursuant to the election ordinance. If a majority of the voters vote in favor of the recall at an election at which at least 30% of the eligible voters participate, the official shall be removed. No official may be subjected to recall proceedings more than once in the course of his or her term.

Section 10. *Vacancies.* The Tribal Council shall appoint a person who meets the criteria of Section 3 of this Article to fill a vacancy caused by the death, forfeiture, removal, resignation or recall of a Council member, and such appointed person shall serve the full unexpired term of the member and thereafter until a successor has been duly elected and seated; *provided*, that in the event of a vacancy in the position of Chairman, the Vice Chairman shall temporarily vacate his or her position and automatically serve as Chairman until a successor Chairman has been duly elected and seated at the next general election for the balance, if any, of the unexpired term of office of the Chairman, *provided further* that in such an event the Tribal Council shall appoint a person who meets the criteria of Section 3 of this Article to fill the resulting

vacancy on the Council, such appointed person to serve until a successor Chairman has been duly elected and seated, and the Tribal Council shall thereafter elect from its members an Acting Vice Chairman.

Article V. General Citizenship Meetings

A meeting of the General Citizenship may be called at any time by the Tribal Council, *provided*, that the Tribal Council shall call such a meeting at least once a year. A General Citizenship meeting shall be called by the Tribal Council upon receipt of a petition specifically requesting such a meeting signed by no less than thirty percent (30%) of the eligible voters. Written notice of General Citizenship meetings shall be posted in a public place and advertised generally in the community. A quorum shall be comprised of twenty percent (20%) of the eligible voters of the Tribe. The Tribal Council shall adopt an ordinance establishing rules and procedures for General Citizenship meetings. At such meetings the General Citizenship shall furnish its advice to the Tribal Council.

Article VI. Elections

Section 1. *General Elections.* The Tribal Council shall select a date in November of every year for regular elections, and shall give at least thirty (30) days notice of such elections, posted in a public place.

Section 2. *Special Elections.* The Tribal Council shall call special elections as necessary provided that at least ten (10) days notice of such special elections is provided by posting in a public place.

Section 3. *Voter Qualification.* Any citizen of the Tribe eighteen (18) years of age or older shall have the right to vote in all tribal elections, provided that he or she has been domiciled within the area specified in Article II of this Constitution for at least six (6) months directly preceding the election, unless such right to vote has been

taken away pursuant to an ordinance adopted in accordance with Article III.

Section 4. *Election Ordinance.* The Tribal Council shall adopt an election ordinance establishing rules and procedures to govern all aspects of voter registration, campaigns, nominations, candidate filings, elections, election protests, and related matters.

Article VII. Powers of the Tribal Council

Section 1. *Powers.* The Tribal Council shall exercise the following powers by appropriate motion, resolution or ordinance, subject to any limitations imposed by the Constitution or applicable laws of the United States:

a. To negotiate with tribal, federal, state, foreign and local governments and others on behalf of the Tribe and to advise and consult with representatives of the United States and the State of Alaska and other states on all activities which may affect the Tribe.

b. To promote and protect the health, education, economic and general welfare of the citizens of the Tribe and their children, and to administer charity and such other services as may contribute to the social, traditional, cultural and economic development of the Tribe.

c. To levy dues, taxes or license fees subject to approval by the tribal voters, and to otherwise raise revenue.

d. To regulate the internal affairs and procedures of the Tribal Council.

e. To encourage, guard and foster the traditional Tlingit cultural practices of the Sitka Indian people, including the protection of artifacts and archaeological sites and the promotion of Tlingit arts and crafts.

f. To authorize or direct subordinate boards, committees, Tribal officials, or Tribal employees to administer the affairs of the Tribe and to carry out the directives of the Tribal Council.

g. To form a federation or union with other tribes subject to approval by the Tribal voters.

h. To manage, lease, exchange, acquire, or otherwise deal with Tribal or other property, and to protect and preserve the Tribal property and the wildlife and natural resources within those areas under the jurisdiction of the Tribe.

i. To prevent the sale, disposition, lease or encumbrance of any property (including lands, waters, interests therein and all other assets) of the Tribe without the consent of the Tribal Council.

j. To make assignments of land or water areas of the Tribe for use and occupancy to citizens of the Tribe in accordance with the customs of the Tribal citizens or with the laws and regulations of the Tribe.

k. To administer any funds within the control of the Tribe.

l. To engage in Tribal economic development enterprises for the benefit of Tribal citizens.

m. To provide for the maintenance of law and order and the administration of justice, including through the establishment of an appropriate Tribal judicial system.

n. To safeguard and promote the peace, safety, morals, physical and general welfare of the citizens of the Tribe and their children.

o. To employ legal counsel, provided that the exercise of this power shall be subject to the ap-

proval of the Secretary of the Interior so long as required by federal law.

p. To organize and charter enterprises, corporations and associations and to join or charter housing authorities.

q. To zone, exercise the power of eminent domain and otherwise regulate land use within those areas under the jurisdiction of the Tribe.

r. To regulate inheritance among citizens and their children whether by intestacy or otherwise, and other domestic relations matters.

s. To practice the rules and procedures necessary to give effect to any provision of this Constitution.

Section 2. *Reserved Powers.* All rights and powers not delegated to the Tribal Council in this Constitution are reserved to the people and may be exercised by the citizens of the Tribe through the adoption of amendments to this Constitution except as otherwise provided in this Constitution.

Section 3. *Sovereign Immunity.* Nothing in this Constitution constitutes a waiver of the sovereign immunity of the Tribe. The sovereign immunity of the Tribe may only be waived by express resolution of the Tribal Council adopted upon the affirmative vote of no fewer than seven Council members including the Chairman. No resolution generally waiving the Tribe's sovereign immunity shall be valid. To be valid a resolution waiving the Tribe's sovereign immunity must be specific and limited as to its duration, the grantee, the transaction, the court having jurisdiction and the law to be applied, and, if subject to the waiver, the property or funds of the Tribe subject to the waiver. No resolution shall be deemed a general consent to the levy of any judgment, lien or attachment upon the

funds or property of the Tribe other than the funds or property specifically pledged, assigned or otherwise expressly made subject to levy in the resolution.

Section 4. *Annual Reports.* The Tribal Council shall make an annual report of its activities, including a budget report, to the general citizenship at the annual general citizenship meeting.

Section 5. *Actions of the Tribal Council.* All ordinances, resolutions and motions (other than routine motions) shall be acted upon by the Tribal Council by a roll call vote and the vote of each member shall be recorded.

Section 6. *Ordinances.* An ordinance shall take effect only after being posted in a public place for thirty (30) days after its adoption by the Tribal Council provided that an emergency ordinance shall take effect immediately. All enacted ordinances shall be made available for inspection by citizens of the Tribe at the Tribal office.

Section 7. *Initiative and Referendum Procedures.* The citizens of the Tribe may propose and enact laws by the initiative, and approve or reject enactments of the Tribal Council by the referendum. An initiative may only propose laws which the Tribal Council is empowered to enact. An initiative or referendum is proposed by a petition setting forth on the top of each page the proposed law to be initiated or the ordinance to be referred, and carrying the signature, printed name and address of no fewer than thirty percent (30%) of the eligible Tribal voters, provided that the Tribal Council may initiate a referendum on its own motion without a petition. A referendum petition may only be filed within ninety (90) days of the enactment of the ordinance to which it is directed. The text (or a summary thereof) of the proposed law or action shall be placed on the ballot of the first special or general Tribal election held more than sixty (60) days after the filing of the initiative or referendum petition, pro-

vided that an election on such petition shall be held no more than 120 days after its filing, provided further that if prior to the election the Tribal Council takes action to enact or repeal an ordinance substantially similar to the measure proposed, the petition shall be deemed void. An initiated law becomes effective thirty (30) days after certification of the results of an election at which a majority of the votes cast are in favor, and for two (2) years thereafter may be amended by the Tribal Council but not repealed. An ordinance rejected by referendum is void thirty days after certification of the results of an election at which a majority of the votes cast favor rejection. No initiative or petition may apply to the dedication of Tribal revenues, to Tribal appropriations, to the establishment of Tribal judicial systems, to local or special legislation, or to the repeal of laws necessary for the immediate preservation of the public peace, health, or safety.

Article VIII. Amendments to the Constitution

This Constitution may be amended by a majority vote of the qualified voters of the Tribe at an election called by the Secretary of the Interior in which at least thirty percent (30%) of the qualified voters take part. The Secretary shall call such an election on a proposed constitutional amendment at the request of five (5) of the nine (9) Tribal Council members or upon petition of thirty percent (30%) of all citizens of the Tribe eighteen (18) years of age or older. To the extent required by federal law, amendments to the Constitution shall become effective when approved by the Secretary of the Interior or his or her authorized representative.

Article IX. Bill of Rights

Section 1. The Tribe shall not make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the

people peaceably to assemble and to petition for a redress of grievances.

Section 2. The Tribe shall not violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.

Section 3. The Tribe shall not subject any person for the same offense to be twice put in jeopardy.

Section 4. The Tribe shall not compel any person in any criminal case to be a witness against himself.

Section 5. The Tribe shall not take any private property for a public use without just compensation.

Section 6. The Tribe shall not deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense.

Section 7. The Tribe shall not require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of twelve (12) months or a fine of $5,000.00 or both, except to the extent as may be authorized by amendment to the federal Indian Civil Rights Act.

Section 8. The Tribe shall not deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

Section 9. The Tribe shall not pass any bill of attainder or ex post facto law.

Section 10. The Tribe shall not deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six (6) persons.

ARTICLE X. ADOPTION

This Constitution, when adopted by a majority vote of the qualified voters of the Sitka Tribe of Alaska voting at an election called for that purpose by the Secretary of the Interior or his authorized representative in which at least thirty percent (30%) of those entitled to vote participate, shall be submitted to the Secretary of the Interior for his approval, and shall be effective from the date of his approval, as provided in the Indian Reorganization Act.

ARTICLE XI. SAVINGS AND SEVERABILITY

Section 1. All enactments and official acts of the Sitka Tribe of Alaska, previously known as the Sitka Community Association, promulgated or adopted prior to the effective date of this Amended Constitution shall remain in full force and effect to the extent they are not inconsistent with any provision of this Constitution, and in the event of any conflict with this Constitution, the provisions of this Constitution shall control.

Section 2. The provisions of this Constitution are severable, and should any provision of the Constitution be determined by a court of competent jurisdiction to be invalid, such invalidity shall not affect the validity of any other provision of this Constitution.

July 25, 1990
(With May 1, 1991 and
October 29, 1991 Revisions)

CERTIFICATE OF RESULTS OF ELECTION

Pursuant to an order issued on November 6, 1991 by the United States District Court, District of Alaska, the Constitution of the Sitka Community Association was submitted to the qualified voters of the Sitka Community Association, and was on November 26, 1991, duly adopted/rejected by a vote of 139 for, and 70 against, and 1 cast ballots found spoiled or mutilated, in an election in which at least thirty percent (30%) of the 210 members entitled to vote, cast their ballots in accordance with Section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), as amended.

/s/ Regina J. Baret
Chairman Election Board

/s/ Adelaide L. Jacobs
Election Board Member

/s/ Bertha L. Karres
Election Board Member

DATE: December 10, 1991

CERTIFICATE OF APPROVAL

I, Eddie F. Brown, Assistant Secretary—Indian Affairs, by virtue of the authority granted to the Secretary of the Interior by the Act of June 18, 1934 (48 Stat. 984), as amended, and delegated to me by 230 D.M. 2.4, do hereby approve the Constitution of the Sitka Tribe of Alaska, formerly known as the Sitka Community Association. This approval shall not be construed to validate any assertion that the Sitka Tribe of Alaska has governmental authority over lands (including management of, or regulation of the taking of fish and wildlife) or persons who are not members of the tribe, absent a ruling by a court of competent jurisdiction, an opinion of the Solicitor of the Department of the Interior or an Act of Congress subsequent to the date of the certification which indicates the existence of such authority over lands or non-members. This Constitution is effective as of this date; *Provided*, That nothing in this approval shall be construed as authorizing any action under this document that would be contrary to Federal law.

/s/ Eddie F. Brown
Assistant Secretary
Indian Affairs

Washington, D. C.

Date: Jan. 3, 1992

APPENDIX C

UNITED STATES DEPARTMENT
OF THE INTERIOR

Office of the Secretary
Washington, D.C. 20240

[Dept. Logo] Jan. 8, 1992

Mr. Niles C. Cesar
Director
Juneau Area Office
Bureau of Indian Affairs
Federal Building
P.O. Box 3-8000
Juneau, Alaska 99802-1219

Dear Mr. Cesar:

We have received the results of the election held on November 26, 1991, by the qualified voters of the Sitka Community Association. The election was called in response to an order issued on November 6, 1991, by the United States District Court, District of Alaska, in *Sitka Community Association v. Lujan*, Civil No. A91-492, which permitted the qualified voters of the Sitka Community Association to vote on the adoption or rejection of a proposed revised constitution.

As evidenced by the completed Certificate of Results of Election, the Constitution of the Sitka Tribe of Alaska was duly adopted by a vote or 139 for and 70 against in an election in which at least thirty percent (30%) of the 210 members registered and entitled to vote cast their ballots. There are, however, a number of things about the adoption of the constitution which I find troubling and believe should be noted.

The simultaneous voter registration and absentee ballot procedure adopted to meet the court deadline virtually guaranteed that the voter participation would satisfy the

statutory requirement of 30% voter participation. I am seriously disappointed, however, in the low voter participation. When the Association insisted on the election being held before Thanksgiving following the court's order of November 6, the Bureau appears to have done everything it reasonably could to advertise the election and the need to register to vote. In the end, while there were 2669 names on the membership roll, only 210 participated. Moreover, the number of votes in favor of the amended constitution, 139, was less than the 145 that adopted the original document 53 years earlier.

The Tribal Council rejected our suggestion to delete the reference in the Preamble to the group's "inherent sovereign rights and powers" and our suggestion to delete the reference to certain powers in Article VII. The Council apparently claims to be the modern-day successor to the historic Tlingit Tribe of Sitka. It is clear from the face of the original Constitution of the Sitka Community Association, however, that it is an organization of "Indians residing in the neighborhood of Sitka." *See* Article II—Membership. There may well have been in historic times a band or group of Tlingit Indians which inhabited the area of Sitka. Yet, it was the Indians residing in the neighborhood of Sitka not any historic Band or group which reorganized pursuant to the Indian Reorganization Act. In any event, the Preamble is not an operative part of the document. By referring to itself in the amended Article I as a "federally recognized sovereign tribe," the Association has added nothing of substance and not altered the Association's fundamental nature. Moreover, whatever the new Tribal Council's powers may be, the exercise of those powers under Article VII is made expressly "subject to any limitations imposed by the Constitution or applicable laws of the United States." Hence, we do not feel compelled to argue further over the Association's generous use of the word "sovereign."

In our technical comments of October 19, we indicated that the Association's unqualified assertion of the existence of

"Indian country," including specific lands, was misleadings and contrary to law. In its October 29, 1991, modification of its proposed amendment of the constitution, the Association rearranged some of the phrases and inserted the phrase "if any" between "Indian country" and the description of included lands.

ARTICLE II—TERRITORY AND JURISDICTION now reads:

> The jurisdiction of the Sitka Tribe of Alaska shall extend to all lands constituting the Native Village of Sitka and the areas formerly known as "Indian Possessions" and "Cottage Settlement", and to all surrounding islands, and all fee lands and allotments all customary and traditional use and access areas in the vicinity or Baranof Island, Chichagof and surrounding islands, and all fee lands and allotments and lands owned by Sealaska, Inc. or Shee-Atika, Inc. located therein (the Native corporations established pursuant to the Alaska Native Claims Settlement Act (P.L. 92-203) as amended to hold the land and other benefits provided by Congress in partial compensation for the extinguishment of the Tribe's aboriginal land rights), to the full extent permitted by federal and tribal law. (Emphasis added.)

The resulting language is somewhat awkward grammatically. In the original constitution, membership is defined in terms of residence in the neighborhood of Sitka which is in turn defined to include the incorporated limits of the town of Sitka and the areas known as "Indian possessions" and "Cottage Settlement." Thus, there may be some justification in the amendment for stating that the justification of the tribe extends to those lands. While the tribe's jurisdiction on these lands may be limited to controlling the actions of its members while on these lands, we need not decide fully the nature and extent of its jurisdiction, if any, on these lands since it has limited its claimed jurisdiction to that permitted by federal law.

The insertion of the qualifying phrase "if any" between "Indian country" and the description of the included lands is not entirely clear. However, I believe that the phrase "if any" must qualify both the existence of "Indian country" generally and the existence of the included lands as "Indian country." If read in this way, I am satisfied that the existence of any possible "Indian country" is sufficiently qualified that, when read with the constitution as a whole and the approval certificate, it is not contrary to applicable law.

I also remain concerned about the sufficiency of the tribe's membership or citizenship roll under the amended constitution. The Association agreed to identify its base roll with a specific date but rejected our suggestion that the roll be approved by the Area Director. The roll which was submitted raises a number of questions. Only slightly over half of those on the roll (1,374 of 2669) list their residence as Sitka, although residence in the neighborhood of Sitka is a requirement for membership under the original constitution. About 7% (or approximately 188) of the names list a non-Alaska city as their residence. Over 20% (or approximately 585) don't list any residence. While a temporary absence does not result in a loss of residence under the original constitution, it is quite specific as to requiring residence to become a member. About 15% do not list any tribal affiliation so we are not even certain if they are "Indians" within the definition of the IRA. However, the list referred to in the amended constitution was compiled pursuant to the original constitution. All the persons on it must meet the requirements of the original constitution. Approval of this amended constitution with its reference to the October 1991 base roll must not be construed as approving the reformation of an organization on a basis other than residence in the neighborhood of Sitka.

Notwithstanding these concerns but having noted them for the record, the Constitution of the Sitka Tribe of Alaska,

formerly known as the Sitka Community Association, is hereby approved pursuant to the authority granted to the Secretary of the Interior by the Act of June 18, 1934 (48 Stat. 984), as amended and delegated to me by 230 D.M. 2.4, and in accordance with the terms of our letter of October 19, 1991. Please deliver the enclosed document to the community.

Sincerely,

/s/ EDDIE F. BROWN
Assistant Secretary—
Indian Affairs

Enclosure

cc: President, Sitka Tribal Council
P.O. Box 1450
Sitka, AK 99845
Area Director, Juneau

APPENDIX D

[State Logo]

LAWS OF ALASKA
1972

Source CSHB 731 Chapter No. 70

AN ACT

Implementing the Alaska Native Claims Settlement Act; and providing for an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

• Section 1. PURPOSE. It is the purpose of this Act to implement the Alaska Native Claims Settlement Act (P.L. 92-203; 85 Stat. 688) by amending state law to resolve those ambiguities, conflicts and problems directly or impliedly created by the enactment by Congress of the Alaska Native Claims Settlement Act. It is also the purpose of this Act to complement through state policy, in a reasonable and fair manner, the federal policy expressed in that Act.

• Sec. 2. AS 13.30 is amended by adding a new section to read:

Sec. 13.30.115 INHERITANCE OF CERTAIN STOCK. (a) Until December 18, 1991, stock in a corporation organized under the laws of Alaska pursuant to the Alaska Native Claims Settlement Act (P.L. 92-203; 85 Stat. 688) which is inalienable under that Act is not subject to probate. Upon the death of the holder, if the stock does not pass by the testamentary disposition clause on the stock certificate,

properly executed, it passes by will or intestate succession. In such a case, the determination of the person entitled to the stock shall be made by the appropriate regional corporation on the basis of an affidavit, furnished to it and to the corporation which issued the stock, showing the right of the person entitled to the stock to receive it and to have a new certificate issued to him. The affidavit, accepted in good faith by a corporation, has the same effect as an affidavit under sec. 4 of this chapter, and the person entitled to the stock, if the affidavit is not accepted, has the remedy set out in sec. 5 of this chapter. In case of dispute as to the person entitled to receive the stock, a person claiming ownership may bring an independent action in the superior court.

(b) Each certificate representing stock in a corporation organized pursuant to the Alaska Native Claims Settlement Act shall bear provisions, on its reverse side, containing blanks to be filled in by the owner, constituting a last will and testament for the purposes of this section and sec. 7(h)(2) of the Alaska Native Claims Settlement Act insofar as the shares represented by that certificate are concerned during the period of its inalienability. The clause must be signed by the owner, dated and notarized. This testamentary disposition may be changed from time to time or revoked, and it governs unless there is a subsequently executed formal will making the specific disposition of the stock.

(c) When ownership of share passes by devise or inheritance or as a result of court action, the shares shall be partitioned, insofar as practicable, in whole shares among those entitled to them.

(d) If a deceased shareholder has failed to dispose of his stock by will and has no heirs under the applicable laws of intestacy, his shares escheat to the corporation.

(e) The situs of inalienable stock of all corporations organized under the Alaska Native Claims Settlement Act is Alaska, until December 18, 1991.

(f) Where appropriate, terms used in this section have the meanings set out in AS 13.45.020(a). In this section "stock" includes membership in a corporation organized under AS 10.20 and inchoate rights to stock.

• Sec. 3. AS 22.10.020 is amended by adding a new subsection to read:

(d) The superior court, in an action for divorce, separation, or child support, affecting inalienable stock in a corporation organized under the federal Alaska Native Claims Settlement Act (P.L. 92-203; 85 Stat. 688), may order the stock transferred to the spouse, a child, or a guardian or custodian for a child, but may not order it sold on the open market or transferred to other persons.

• Sec. 4. AS 38.15 is amended by adding new sections to read:

ARTICLE 2. MANAGEMENT CONTRACTS AND LAND EXCHANGES; P.L. 92-203 CORPORATIONS.

Sec. 38.15.050. CONTRACTS BETWEEN DEPARTMENT OF NATURAL RESOURCES AND P.L. 92-203 CORPORATIONS. A corporation organized under Alaska law pursuant to the federal Alaska Native Claims Settlement Act (P.L. 92-203; 85 Stat. 688) may contract with the state Department of Natural Resources for the management of land; however, no sale, lease, exchange or other disposal of this land may be made without the approval of the corporation owning it. The contract is terminable upon reasonable notice by either party to it; it may cover all or a portion of the land of the corporation,

and shall provide for the terms of management by reference to law or regulation or otherwise. The Department of Natural Resources is authorized to receive and expend, subject to appropriation, funds necessary to carry out its functions under this section.

Sec. 38.15.060. EXCHANGE OF LAND. (a) With the consent of the governor, a corporation organized under Alaska law pursuant to the federal Alaska Native Claims Settlement Act (P.L. 92-203; 85 Stat. 688) which would otherwise be entitled to select land within the area withdrawn by sec. 11(a)(1)(A) and (B) of the federal Act, which, however, has been selected by and patented to the state before December 18, 1971, may obtain up to 23,040 acres of this land, if it has not been disposed of or developed, by exchanging land or interests in land with the state.

(b) An individual Native (as defined in the federal Act) or a corporation referred to in (a) of this section may exchange land or an interest in land with any other individual Native or corporation referred to in (a) of this section or the state for the purpose of effecting land consolidations or to facilitate the management or development of the land.

(c) Exchanges shall be on the basis of equal value, and either party to the exchange may pay or accept cash in order to equalize the value of the properties exchanged.

• Sec. 5. AS 43.80 is amended by adding a new section to read:

Sec. 43.80.015. TAXATION UNDER P.L. 92-203. (a) The receipt of the original issue of shares of stock in a corporation organized under Alaska law pursuant to the federal Alaska Native Claims Settlement Act (P.L. 92-203; 85 Stat. 688) by or on behalf of a Native (as defined in the federal Act) is not subject to any form of state or local taxation.

(b) The receipt of land or an interest in it under the federal Act or of cash in order to equalize the values of property exchanged under sec. 22(f) of that Act or AS 38.15.060 is not subject to any form of state or local taxation. The basis for computing gain or loss on subsequent sale or other disposition of this land or interest in land for purposes of a state or local tax imposed on or measured by income is the fair value of the land or interest in land at the time of receipt.

(c) A real property interest conveyed under the federal Act or AS 38.15.050 or 38.15.060, including land received in an exchange under sec. 22(f) of the federal Act or AS 38.15.060, to a Native individual or corporation incorporated under Alaska law pursuant to the federal Act, which interest is not developed or leased to third parties, is exempt from state and local real property taxes and local assessments until December 18, 1991. However, municipal taxes, local real property taxes, or local assessments may, under the laws of the state, be imposed upon leased or developed real property within the jurisdiction of any governmental unit organized under the laws of the state. Easements, rights-of-way leaseholds, and similar interests in real property may be taxed in accordance with state or local law. All rents, royalties, profits, and other revenues or proceeds derived from property interests are taxable to the same extent as these revenues or proceeds are taxable when received by a non-Native individual or corporation. In sec. 21(d) of the federal Act, the exemption of real property interests from local real property taxes includes exemption from local assessments and extends to land received in an exchange under sec. 22(f) of the federal Act or AS 38.15.060.

(d) Use of the terms "corporate funds" and "dividends", in sec. 7(j) and (m) of the federal Act, does not determine whether the money is a dividend, distribution to shareholders, funds which are property, surplus or capital of a regional corporation for the purposes of this title or AS 10.05 or other applicable state law, the provisions of sec. 8 of this Act notwithstanding.

• Sec. 6. AS 45.55 is amended by adding a new section to read:

Sec. 45.55.138. APPLICATION TO ALASKA NATIVE CLAIMS SETTLEMENT ACT CORPORATIONS. The initial issue of stock of a corporation organized under Alaska law pursuant to the Alaska Native Claims Settlement Act (P.L. 92-203; 85 Stat. 688) is not a sale of a security under secs. 70 and 130(10) of this chapter.

• Sec. 7. AS 45.60 is amended by adding a new section to read:

Sec. 45.60.016. P.L. 92-203 CORPORATIONS; CUSTODIANS. (a) Stock or membership in a corporation organized under Alaska law pursuant to the Alaska Native Claims Settlement Act which a minor is entitled under the settlement Act to receive shall be issued by the corporation to a custodian.

(b) The custodian shall be determined in accordance with the order of priority set out below, and the appointment becomes effective upon the corporation's receipt of the custodian's written consent to the appointment:

(1) the legal guardian, if any, of the minor;

(2) a parent, if any, of the minor, as selected by his parents;

(3) an adult member of the minor's family, as defined in sec. 91(12) of this chapter; it may also include members of the family with whom the minor has customarily lived.

(c) For good cause, a district court or the superior court may vary the order of priority set out in (b) of this section or appoint another suitable person as custodian, and, for good cause, the superior court may establish a guardianship under AS 20.05 for a minor.

(d) The custodianship is governed by this chapter, as modified by the following:

(1) in sec. 31(d), "deliver or pay over to the estate of the minor" includes delivery to the heirs by intestate succession or custodians for the heirs, under this chapter;

(2) under sec. 51, a third person is responsible for determining whether stock is inalienable under the settlement Act;

(3) the custodian shall give an appropriate receipt for the stock or other property received for the minor, which may include real or personal property, gifts to a minor, and alienable stock vested in the minor;

(4) the custodian may not alienate inalienable property except within the limits provided by law;

(5) the form of registration or title shall be "as custodian for [name of minor] under the Alaska Native Claims Settlement";

(6) a custodian may not receive compensation except, upon application to and approval by the superior court, for unusual and extraordinary services;

(7) "custodial property" includes securities, money and other real and personal property under supervision as a consequence of the settlement Act.

(e) In this section, "settlement Act" means the Alaska Native Claims Settlement Act (P.L. 92-203; 85 Stat. 688), including amendments to it.

• Sec. 8. To the extent of an inconsistency between a provision of this Act or AS 10.05 or 10.20 and a provision of the Alaska Native Claims Settlement Act (P.L. 92-203; 85 Stat. 688) or a provision in the articles of incorporation or bylaws required by the U.S. Secretary of the Interior under sec. 7(e) of the federal Act, the federal Act or the required provision in the articles or bylaws prevails with regard to a corporation organized under Alaska law pursuant to the federal Act. To the extent of an inconsistency between a provision of this Act and a provision of AS 10.05 or 10.20, this Act prevails with regard to a corporation organized under Alaska law pursuant to the federal Act. To the extent of an inconsistency between a provision of this Act and a provision of AS 10.05 or 10.20, this Act prevails with regard to a corporation organized under Alaska law pursuant to the federal Act.

• Sec. 9. AS 38.30 is repealed.

• Sec. 10. If an Act is passed by the Seventh Alaska Legislature repealing the provisions of AS 13.20, AS 13.30.115, enacted in sec. 2 of this Act, is unaffected unless specifically referred to in the repealer, and the revisor of statutes shall make an appropriate relocation of the section.

• Sec. 11. AS 13.30.115, enacted in sec. 2 of this Act, is retroactive to December 18, 1971.

• Sec. 12. This Act takes effect on the day after its passage and approval or on the day it becomes law without approval.

Approved by governor: May18, 1972

Actual effective date:

Sec. 2: December 18, 1971; all other secs.: May 19, 1972

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Petitioner,

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INTEREST OF THE *AMICI* STATES

The States of the Union face a new and troubling challenge to their sovereignty and jurisdiction. The Ninth Circuit Court of Appeals has brought into the ambit of Indian country (and thus out of the ambit of most state jurisdiction) vast lands in the State of Alaska. It has done so by simply declaring that a "dependent Indian community" exists on these lands, using a novel, unworkable and confusing standard that could well facilitate the

judicial recognition of Indian country on similar lands in and throughout the various States, lands not heretofore recognized as Indian country.[1]

While construing a congressional settlement act relating to Alaska Native land claims, the Ninth Circuit rested its construction on its reading of another federal statute, 18 U.S.C. 1151, defining "Indian country," and various judicially-created standards that have evolved for the past 50 years. However, by construing these standards too broadly, the Court of Appeals has accomplished precisely the opposite of what Congress intended in enacting the Alaska Native Claims Settlement Act ("ANCSA"). The consequences of this decision are especially unsettling and troublesome to Alaska and the other States.

Judicial, rather than congressional, creation of Indian country is particularly disturbing to the States, their officials and their citizens, to whom the Congress is politically accountable and responsible whenever it alters or limits State power and jurisdiction under the powers given to it in our federal system. Judicial designation of Indian country in contravention of or in the absence of an act of Congress may divest States of civil and criminal jurisdiction on lands within the borders of those States where that jurisdiction historically has applied, without such accountability. The divestiture of state power may include the loss of the ability to enforce state criminal codes, to apply a state's civil laws in a uniform manner, to tax and evenhandedly regulate routine activities on those lands, and to protect the state's natural resources, environmental quality and consumer health and safety.

---

[1] Each *amici* State either already has or may in the future have within its borders lands recognized as Indian country. Significantly, the States may also have citizens who are Indians, either tribal members from that or another State or those seeking federal recognition as tribal members, but who have no land recognized as Indian country. States have expressed their concern that recognition of Indian country under the premises in this case will divest jurisdiction long assumed to be intact and legitimate.

States also face assertions of tribal authority to tax, to regulate the land of non-members, to subject non-members to tribal court adjudications, to engage in gambling activities, and to control timbering, mining, water use, hunting and fishing in this newly-determined "Indian country," thereby affecting the state's resources and environmental quality. As individual Indians and Tribes assert various claims of rights and interests against the States through litigation, States increasingly are struggling to defend legitimate State interests and sovereignty.

The amici States' difficulty arises from the Court of Appeals' overly-broad and erroneous formulation of what constitutes a Federal "set aside" for purposes of finding a "dependent Indian community" under 18 U.S.C. 1151(b) and its assumption of Federal "superintendence" from the on-going relationship between any Tribe and the United States and from virtually *any* Federal involvement. The Ninth Circuit so stretched the standards for "dependent Indian community" in this case that other courts may not be able to avoid finding a "dependent Indian community" on various lands claimed by Indians, notwithstanding congressional disclaimers to the contrary, the non-federal title of lands, lack of federal control or regulation of the lands, or minimal federal involvement in any land transfer or holding.

Amici States fear they will face claims by tribal interests that have taken unilateral actions to acquire land and, based on minimal federal presence in the area, successfully assert the lands are Indian country as a "dependent Indian community." Indeed, in this case, the acquisition of the land in fee by the Native Village of Venetie Tribal Government ("Village"), was, as the District Court found, a unilateral act of the village, not an acquisition or grant by or from the federal government. Moreover, the acquisition by the Village was not pursuant to any specific federal statute, order or regulation. The Village acquired the land in fee from the state chartered corporations. Yet, the Ninth

Circuit reached further back, finding ANCSA's transfer of land to the corporations was a "set aside" for the Village, ignoring the subsequent unilateral act of the Village to acquire the land in fee. Indian Tribes on the East Coast, in the Midwest and South, and in California, Oregon, Washington, Wyoming and Idaho, have purchased land to expand their landholdings. Nothing prevents a Tribe from acquiring lands in States other than where the Tribe is principally located, including in States which currently have no recognized Indian country. These lands generally are subject to state and local civil and criminal authority and taxation powers. However, even though these lands may be purchased "unilaterally," i.e., solely by the Tribe as fee lands, some measure of federal involvement, approval or restraint on alienation may accompany these purchases. Unless this Court corrects the Ninth Circuit reasoning, the States may face a significant, but unwarranted, displacement of state authority and jurisdiction.

SUMMARY OF ARGUMENT

The intent of Congress in the Alaska Native Claims Settlement Act ("ANCSA"), Pub. L. No. 92-203, 85 Stat. 688, 43 U.S.C. 1601 *et seq.*, was to transfer land to the state-chartered Native corporations in settlement of Native land claims, not to establish a new form of Indian country. Amici States agree with Alaska that Congress intended an entirely new approach in ANCSA, unparalleled in federal Indian relations. It specifically eschewed traditional reservations and trust lands and significantly displaced federal and Native governmental authority with state authority. Amici States agree with the United States District Court and the relevant Interior Solicitor's Opinion that the ANCSA-transferred lands are not Indian country.

While in this case the Ninth Circuit construed one statute, ANCSA, its conclusion that the land at issue is a "dependent Indian community" rests on its construction of another federal statute, 18 U.S.C. 1151. That statute,

enacted in 1948, defined "Indian country" in the criminal code, and it included several general categories, including reservations, dependent Indian communities and Indian allotments. The statute was designed to consolidate numerous conflicting and inconsistent decisions of the courts. However, in this case, the Ninth Circuit fashioned such broad standards for a "dependent Indian community" under section 1151 as to suggest that courts may attach that legal status to lands long understood not to be Indian country and which are otherwise subject to state civil and criminal laws.

Long before the statute was enacted to codify existing law, this Court has adopted a fundamental test for "Indian country," rejecting any crucial distinction among the forms of Indian country. This Court has always asked whether the lands in question have been validly *set apart* for the use of Indians, *as such*, under the *superintendence of the Government*, language derived from *United States v. McGowan*, 302 U.S. 535, 539 (1938), and *United States v. Pelican*, 232 U.S. 442, 449 (1914). It is the requirement of "set aside" and "superintendence" which is essential to determining whether lands are in fact Indian country and essential in the test for "dependent Indian community."

Of course, the consequences of a judicial finding that Indian country exists on lands within a state not previously understood to fall within that status are profound. First, the full application of the state's criminal laws are jeopardized. Additionally, a judicial recognition of Indian country deprives a State of its ability to apply its civil laws in a uniform manner, to tax activity on those lands, and to protect the state's natural resources, environmental quality and consumer health and safety.

One of two principal difficulties in the Ninth Circuit *Venetie* decision is its overly-broad acceptance of *any* federal involvement as satisfying the kind of federal superintendence necessary for a finding of a "dependent Indian

community." This Court's decision in *McGowan* referred to the government retaining *title* to lands and having the *authority to enact regulations and protective laws for the lands*. 302 U.S. at 539. Yet, the Ninth Circuit disregarded this test and concluded that the federal government's on-going involvement with Indians and the Village sufficed to establish Indian country. The policy implications of the Ninth Circuit decision are significantly detrimental to the States and their citizens. Further, it will lead to endless and protracted litigation over lands long understood not to be Indian country, fully subject to state jurisdiction. Amici States suggest this Court adopt a standard which makes it clear that, in order to be a "dependent Indian community," the federal government, not the state, be the dominant political institution in the area. This standard would ensure that this Court's requirement of "federal superintendence" is respected before courts summarily take lands out of state jurisdiction.

The second difficulty arises from the Ninth Circuit's reading of this Court's "set aside" requirement. The appeals court ignored the unilateral nature of the Village's own acquisition of the land from the state-chartered Native corporation, and instead recognized a federal set-aside for the Village. It was not, however, the intent of Congress to set aside this land as "Indian country" in general, nor as a "dependent Indian community" in particular.

In sum, amici States believe this Court would further a favorable policy and more predictable results under the law by adopting a standard which requires a true and *direct* "set aside" by the Congress of lands intended to be a "dependent Indian community." Similarly, this Court may favorably settle Indian law and policy by adopting a standard for "federal superintendence" that requires that the federal government, not the state, be the *dominant political institution* in the area.

ARGUMENT

I.

THE NINTH CIRCUIT HAS RADICALLY MISINTERPRETED THE INTENT OF CONGRESS IN THE ALASKA NATIVE CLAIMS SETTLEMENT ACT

Amici States adopt and support the arguments of the State of Alaska in which that State submits that the Ninth Circuit has radically misread the intent of the Congress in its passage of the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. 1601 et seq. While ANCSA was directed at but one State, the other States agree with Alaska that congressional intent was blatantly disregarded in this case, which, by itself, has ominous implications for all States. In transferring land to the state-chartered corporations in settlement of Native land claims, Congress undertook an entirely new approach in ANCSA, unparalleled in federal Indian relations. It is one that expressly eschewed traditional reservations and trust lands and substantially displaced federal governmental authority with state authority. See Department of Interior, Sol. Op. M-36975, January 11, 1993, at 107-112. Yet, the Ninth Circuit has read ANCSA to provide just the opposite.

Both the United States District Court in this case and an Interior Department Solicitor's Opinion, which exhaustively reviewed the legal status of lands that were the subject of ANCSA, correctly concluded that the ANCSA-transferred lands are not Indian country. Department of Interior. Sol. Op. M-36975, January 11, 1993. Amici States agree with the analysis in the district court opinion and the Solicitor's Opinion, and urge this Court to do the same.

II.

THE JUDICIAL RECOGNITION OF A "DEPENDENT INDIAN COMMUNITY" ESSENTIALLY DIMINISHES THE STATES' TRADITIONAL POLICE POWERS AND SOVEREIGN AUTHORITY TO PROTECT AND REGULATE THE CONDUCT OF THEIR CITIZENS

While in this case the Ninth Circuit construed one statute, the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. 1601 et seq., its conclusion that the land at issue is a "dependent Indian community" rests on its construction of another federal statute, 18 U.S.C. 1151. That statute, enacted in 1948, defined "Indian country" in the criminal code, as

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, . . . (b) all dependent Indian communities . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished. . . .

18 U.S.C. 1151. The statute was designed to codify a series of decisions of this Court. Reviser's Note, Act of June 25, 1948, c. 645, 62 Stat. 757; *United States v. John*, 437 U.S. 634, 648-49 (1978). Yet, as discussed below, the Ninth Circuit adopted in this case such broad standards for finding a "dependent Indian community" under 1151(b), and thereby "Indian country," as to suggest that courts may attach that legal status to lands long understood not to be Indian country and which are otherwise subject to state civil and criminal laws.

When assessing whether state or tribal powers apply to lands claimed by Indians, this Court has informed us that the inquiry starts with "whether the land is Indian country." *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, 125 (1993), citing *Oklahoma Tax Commission v. Citizen Band of Potawatomi Tribe of Oklahoma*, 498 U.S. 505 (1991). Because Congress, in section 1151, simply provided broad categories of Indian

country, without giving qualifying requirements or standards, it has been for the courts to provide them.[2] This Court has repeated its fundamental test for "Indian country" over time, rejecting any crucial distinction among the forms of Indian country: "Rather, we ask whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government.'" *Oklahoma Tax Commission v. Citizen Band of Potawatomi Tribe of Oklahoma*, at 511, quoting *United States v. John*, 437 U.S. 634, 648-49 (1978). This language, in turn, derives from this Court's earlier decisions in *United States v. McGowan*, 302 U.S. 535, 539 (1938), and *United States v. Pelican*, 232 U.S. 442, 449 (1914). It is this requirement of both "set aside" and "superintendence" which is essential to determining whether lands are in fact Indian country and meet the test for "dependent Indian community." The failure of the Ninth Circuit to properly apply these requirements is the heart of the problem in the *Venetie* decision.

This Court addressed the notion of a "dependent Indian community" in *United States v. Sandoval*, 231 U.S. 28 (1913), and *United States v. McGowan*, 302 U.S. 535 (1938). Both of these cases were decided before the enactment of section 1151(b), which simply codified the term from the case law as one of three statutory categories of Indian country. In *Sandoval*, this Court construed a congressional act designating that the lands held by the New Mexico Pueblos were "Indian country." *Id.*, at 37-39. In describing the special circumstances of that case, this Court noted the United States exercised various con-

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[2] Consistent with *Narragansett Indian Tribe v. Narragansett Electric Co.*, 89 F.3d 908, 916-922 (1st Cir. 1996), the Eighth Circuit Court of Appeals recently noted the categories that constituted "Indian country" included on the one hand "allotments, the Indian titles to which have not been extinguished" under 18 U.S.C. 1151(c), and lands which constituted "Indian country" because they were "dependent Indian communities" under 18 U.S.C. 1151(b). *United States v. Stands*, 105 F.3d 1565, 1571-1572 (8th Cir. 1997).

trols, authority and its "fostering care and protection over all *dependent Indian communities* within its borders. . . ." *Id.*, at 46 (emphasis added).

In *McGowan*, this Court examined whether an Indian colony on lands owned by the United States, purchased out of funds appropriated by the Congress in 1917 and 1926 to provide for needy non-reservation Indians in Nevada, qualified as Indian country. *United States v. McGowan*, 302 U.S. at 537. Relying on the language in *Sandoval*, the Court noted that the Colony was (1) under the superintendence of the federal government; (2) the government retained title to lands; and (3) the government had authority to enact regulations and protective laws for the lands. *Id.*, at 539. *McGowan* was the last case of this Court to address the meaning of "dependent Indian community."

A "reservation" established by congressional or executive action is undoubtedly the principal form of Indian country.[3] "Dependent Indian community," however, has evolved into the exception to the rule, even though *Sandoval* and *McGowan* both turned on congressional acts. Since the enactment of section 1151(b), the courts have been asked to identify "dependent Indian communities" on lands not explicitly designated as Indian country by either the Congress or the Executive branch. These courts have applied judicially-evolved tests to determine whether certain lands qualify under section 1151(b). *United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971); *United States v. South Dakota*, 665 F.2d 837, 839 (1981), *cert. denied*, 459 U.S. 823 (1982).

[3] Creating reservations is the principal means by which the federal government establishes Indian country and presents the fewest problems in the analysis of where tribal jurisdiction applies and where state jurisdiction is limited. Spaeth, *American Indian Law Deskbook*, 35 (U. Colo. 1993). In the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. 461-479, Congress delegated to the Secretary of Interior the power to acquire and designate new lands set aside for Indians as reservations. 25 U.S.C. 465, 467. It appears this is the standard means of establishing new Indian country.

The consequences of a judicial finding that Indian country exists on lands within a state not previously understood to fall within that status are profound. Foremost, the application of the state's criminal laws, an area "where States historically have been sovereign," *United States v. Lopez*, —— U.S. ——, 115 S. Ct. 1624, 1632 (1995), falls into doubt. The "historic police powers of the States' are not displaced by a federal statute 'unless that was the clear and manifest purpose of Congress.'" *Id.*, at 1640 (concurring op. of Kennedy, J., quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).) In section 1151, Congress exercised its plenary power in Indian affairs by defining Indian country (and thereby allowing the displacement of the States' criminal laws), but provided no new standard in defining the term "dependent Indian community," presumably leaving *Sandoval* and *McGowan* as the benchmarks.

The displacement of most state criminal law when Indian country is established or recognized is generally well understood. This Court has recognized that the displacement is as much a function of congressional plenary power as of any inherent tribal power. *Compare Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832), *with United States v. Kagama*, 118 U.S. 375, 381-82 (1886); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172, n. 7 (1973); *Antoine v. Washington*, 420 U.S. 194, 201-202 (1975). Congress has provided for federal criminal jurisdiction *within Indian country* for the general laws of the United States as to the punishment of offenses, 18 U.S.C. 1152, various "major" crimes, 18 U.S.C. 1153, and in liquor-related prohibitions, 18 U.S.C. 1154-56, in cases involving offenses by or against Indians.[4] Congress has pro-

[4] Numerous other federal laws are directed to Indian country, which also serve to displace state criminal law or to assimilate it

vided that a few States shall have criminal jurisdiction as to offenses committed by or against Indians in Indian country the same as outside Indian country. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, 18 U.S.C. 1162 ("Public Law 280," or "P.L. 280").[5] However, even as to P.L. 280 states, that jurisdiction is limited by court rulings and subsequent congressional acts. *Bryan v. Itasca County*, 426 U.S. 373, 379 (1976); *California v. Cabazon*, 480 U.S. 202, 209-210 (1987) (P.L. 280 authorizes criminal jurisdiction only with respect to criminal prohibitory, not civil-regulatory laws; only criminal laws of statewide application and not local criminal codes apply); *Pfingst v. Sycuan Band of Mission Indians*, 54 F.3d. 535 (9th Cir. 1995), 18 U.S.C. 1166(c) ("gaming" offenses in P.L. 280 states the subject of exclusive prosecution by the United States). Thus, recognized as such, they essentially "carve out" of the State its most cherished and traditional police power, that of enforcing its criminal laws, equally among its citizens.

Additionally, a judicial recognition of Indian country deprives a State of its ability to apply its civil laws in a uniform manner, to tax activity on those lands, and to protect the state's natural resources, environmental quality and consumer health and safety. See Petition, pp. 14-15. Of particular importance to States is their jurisdiction to impose environmental laws and regulations consistently and uniformly throughout the State for the protection of the state's resources and its citizens. Such vital jurisdiction is lost when a court recognizes Indian country. *See Washington Dep't of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985) (recognizing "the vital interest of the State of Washington in effective hazardous waste management throughout the state, including on Indian lands," but squarely rejecting the state's authority to regulate "hazardous waste-related activities on Indian lands."). In turn, states may face assertions of tribal authority to tax, to regulate the land of non-members, to subject non-members to tribal court adjudications, to engage in gambling activities, and to control timbering, mining, water use, hunting and fishing in this newly-recognized "Indian country," thereby affecting the state's resources and environmental quality.

and leave it to federal prosecution, e.g., 18 U.S.C. 437, 1158, 1159, 1163, 1164, 1165, 1166-68.

[5] Congress has also conferred criminal jurisdiction on certain states with respect to Indian country offenses for specific Tribes under statutes other than P.L. 280, e.g., Act of June 30, 1948, ch. 759, 62 Stat. 1161 (Iowa); 18 U.S.C. 3243 (Kansas); *id.*, 232 (New York); *id.* 1747 (Florida); several statutes conferring same on Oregon as to specific Tribes.

In this case, the Ninth Circuit expands Indian country in Alaska, and, by means of its loose standard for a "dependent Indian community," it opens the door to carve out of the States significant state sovereign interests. It allows the recognition of Indian country willy-nilly, and is so broad as to suggest Indian country recognition where there is the "mere presence of Indians in a particular area . . ." *See United States v. Martine*, 442 F.2d 1022, 1024 (10th Cir. 1971). At the very least, it opens the door to endless and protracted litigation. Amici States urge this Court to reject the standard and the inevitable results.

III.

THIS COURT SHOULD ADOPT THE FIRST CIRCUIT STANDARD THAT A "SET ASIDE" AND "SUPERINTENDENCE" ARE MET ONLY WHEN THE FEDERAL GOVERNMENT, NOT THE STATE, IS THE DOMINANT POLITICAL INSTITUTION IN THE AREA.

United States v. McGowan, 302 U.S. 535, decided by this Court in 1938, was the last case of this Court to address a "dependent Indian community" before Congress codified "Indian country" in 18 U.S.C. 1151. *McGowan* not only required the superintendence of the federal gov-

ernment, it referred to the government retaining *title* to lands and having the *authority to enact regulations and protective laws for the lands.* 302 U.S. at 539.

The term "dependent Indian community" itself suggests the reach of § 1151(b). First, an "Indian *community*" must exist—a requirement indicating that more than just a discrete piece of property is involved. The notion of an "Indian community" reflects what was present in *Sandoval*: a geographical area set aside for the exclusive occupancy of a culturally and politically distinct group of Indians. Second, the Indian community must be "dependent" in nature; i.e., the land in question must have been set aside for the purpose of continuing the wardship status of the community's members and facilitating the Government's discharge of its trust responsibilities. In *McGowan*, for example, Congress created the Reno Colony "to provide lands for needy Indians scattered over the State of Nevada[] and to equip and supervise these Indians in establishing a permanent settlement." 302 U.S. at 537. Lower federal courts have adopted differing approaches to determining whether these elements exist, but none has departed so radically from the basic guideposts as the Ninth Circuit.

After the passage of 18 U.S.C. 1151(b), the Tenth Circuit in *United States v. Martine*, 442 F.2d at 1023-24, formulated a three-part test requiring analysis of: (1) the nature of the area in question; (2) the relationship of the inhabitants of the area to Indian Tribes and the federal government, and (3) the established practice of government agencies toward the area. In *Martine*, the court, with no analysis, summarily found a dependent Indian community on lands purchased with tribal funds from a corporate owner, and relied on the findings of the trial court as to the elements of the three-part test above.

The Eighth Circuit in *United States v. South Dakota*, 665 F.2d 837, refined the test, incorporating the

Martine test only in its second prong,[6] but setting forth key elements for analysis, including whether there is federal title, retention of federal authority, and the "set aside" and "superintendence" elements. In *Venetie*, however, the Ninth Circuit re-wrote the Eighth Circuit test by dropping reference to federal "title," finding that unimportant, 101 F.3d at 1292, suggesting instead that the courts look to the "degree of federal ownership and control." It labeled its test more "textured" than the district court's, which generally followed *South Dakota*. In rejecting the Eighth Circuit's tests, the Ninth Circuit has significantly enhanced the probability that lands heretofore subject to state jurisdiction will be removed from state jurisdiction.

While the court in *South Dakota* found a dependent Indian community on lands that were the subject of a HUD-financed housing project, it importantly included in its test the *McGowan*-derived "title" element (the *federal government* held the land in trust for the tribe) and the *Mound*-derived "set aside" element (the land was designated for use for the Tribe's Low Rent Housing Project).

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[6] The Eighth Circuit offered a four-part test: (1) whether the United States retained *title* to the lands and retains authority to enact regulations and protective laws as to those lands, citing *Weddell v. Meierhenry*, 636 F.2d 211, 212 (8th Cir. 1980), *cert. denied*, 451 U.S. 941, 101 S. Ct. 2024, 68 L.Ed.2d 329 (1981)); (2) the nature of the area in question, the relationship of the inhabitants of the area to Indian Tribes and the federal government, and the established practice of government agencies toward the area, 636 F.2d at 212, *citing United States v. Martine*; (3) whether there is an element of cohesiveness there, 636 F.2d at 212-13, *citing United States v. Morgan*, 614 F.2d 166, 170 (8th Cir. 1980); and (4) whether the land has been set apart for the use, occupancy and protection of dependent Indian peoples, 636 P.2d at 213, *citing United States v. Mound*, 477 F. Supp. 156, 158 (D.S.D. 1979), *citing Youngbear v. Brewer*, 415 F. Supp. 807, 809 (N.D. Iowa 1976), *aff'd* 549 F.2d 74 (8th Cir. 1977). *United States v. South Dakota*, 665 F.2d at 839.

Amici States submit that the First Circuit Court of Appeals in *Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908 (1st Cir. 1996), has provided the most faithful rendition of the factors set forth by this Court before section 1151 was passed and the factors articulated in subsequent decisions by the First Circuit and other Courts of Appeals. In *Narragansett*, the court found that there was no federal set aside. It adopted a view that a "set aside" *must* be tied to the requirement in *McGowan*, *Pelican* and *Mound*, that the land *must* be under the superintendence of the federal government. The *Narragansett* court noted such superintendence is shown only

> 'where the degree of congressional and executive control over the tribe is so pervasive as to evidence an intention *that the federal government, not the state, be the dominant political institution in the area.*'

89 F.3d at 920, quoting the District Court decision in this case, *Alaska v. Native Village of Venetie*, 1995 WL 462232 (D. Alaska Aug. 2, 1995) at 14 (*rev'd*, 101 F.3d 1286.). While the federal government engaged in various programs in *Narragansett*, such as BIA financial assistance and HUD housing projects, there was no evidence that Congress intended that the federal government have a role there as the dominent political institution.

The Ninth Circuit in *Venetie*, however, expressly rejected the requirement that the federal government be the dominant political institution in the area. In its more "textured" approach, the Ninth Circuit allows virtually *any* federal activity in the area, flowing from the government's on-going relationship with Indians and Native Alaskans, to constitute the kind of "superintendence" that satisfies this Court's test. Nor does it provide a threshold level of federal activity to enable one to make a reasonable determination of what constitutes "superintendence." Amici States submit the First Circuit's "dominant political institution" test furthers predictability under the law and a generally favorable policy—one that reflects

significant federal interests only when there is a dominant federal presence.

The *Narragansett* court also looked to *Buzzard v. Oklahoma Tax Commission*, 992 F.2d 1073 (10th Cir. 1992), for the significance of the United States taking land into trust as indicia of a federal intent to "set aside" the lands for the Indians, as such, and wherein federal control will become dominant. While *Narragansett* stated that federal title is not a prerequisite, *see Martine*, 442 F.2d at 1023, it also noted lack of federal title weighed against the Tribe's claim. 89 F.3d at 921. The court observed that in the majority of cases in which the land was privately held, the courts found there was not a dependent Indian community, and that in *Buzzard, a unilateral* purchase by the Tribe of lands which it then subjects to a restriction on alienation by the federal government cannot constitute the "set aside" or "superintendence" necessary for recognition of a dependent Indian community. *Id.*

In *Venetie*, the Ninth Circuit sidestepped the point in *Buzzard*, and held the necessary "set aside" derived from the congressional approval of the land settlement. The Court of Appeals ignored the express intent of the Congress *not* to create trust land or reservations for Alaska Natives, instead requiring the land be transferred to state-law corporations. It also ignored the fact that the Village acquired the land from the state-chartered corporation *unilaterally*, not from the federal government, nor pursuant to any federal statute, order or regulation. It dismissed the notion that federal title should play any role in its analysis, noting that Indian country was found where the Tribe held fee title in the seminal case on the subject, *United States v. Sandoval*, 231 U.S. 28. The Ninth Circuit failed to acknowledge the special circumstances in *Sandoval*, where this Court construed two *congressional acts* that specifically treated the Pueblos as Indian country.

Most significantly, the Ninth Circuit dismissed the notion that the federal government must evince an intent to be the dominant political institution: apparently, any modicum of federal activity in relationship to the Tribe suffices. The First Circuit in *Narragansett* provides a clean test to determine a threshold level of federal involvement, and amici States urge this Court adopt that standard to provide reliability and certainty in the matter.

Finally, the Ninth Circuit dismissed the notion that superintendence must relate in any way to the land, but instead, need only go to Indian people. This disengagement of superintendence from the land permits a finding of superintendence to arise merely from the relationship that the federal government has with Indians in general. Amici States, in the interest of seeking certainty and reasonableness for future judicial determinations of "dependent Indian community," respectfully urge this Court to adopt standards that measure up to this Court's requirements from *Sandoval* and *McGowan*. The language of *Narragansett* provides this Court with that opportunity, as it reflects this Court's original jurisprudence. *Venetie*, on the other hand, fails the test and should be reversed.

CONCLUSION

This Court has the opportunity in this case to provide clear guidance to other courts on when and where Indian and Native Alaskan tribal jurisdiction should be judicially recognized using the concept of a "dependent Indian community." Because of the serious displacement of significant State interests when courts make findings of Indian country, amici States urge this Court to confine this kind of judicial recognition to those cases where Congress has clearly spoken. This Court may reach back to its original holdings and principles relating to "dependent Indian communities," holdings upon which Congress acted. These principles require a direct "set aside" of lands by the federal government for the Indians and federal superintendence that includes a dominant political presence on those lands. The Ninth Circuit Court of Appeals ignored the intent of Congress and read its own novel, unworkable standards into a judicial determination of Indian country, to the detriment of the sovereign interests of Alaska and its citizens, and to the potential detriment of all the States and their sovereign interests. The Ninth Circuit decision in *Venetie* leads to unpredictability and confusion in Indian law, and, consequently, this Court should reverse it.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1996

STATE OF ALASKA,

Petitioner,

v.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* ALASKA FISH & WILDLIFE FEDERATION AND OUTDOOR COUNCIL, INC. AND ALASKA FISH AND WILDLIFE CONSERVATION FUND, INC. IN SUPPORT OF PETITIONER

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Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962) ..... *passim*

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Stepovak-Shumagin Set Net Ass'n v. State of Alaska, Board of Fisheries, 886 P.2d 632 (Alaska 1994) 16

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Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. § 1601 *et seq.*) (1971) 2, 22, 23

Pub. L. No. 96-487, 94 Stat. 2371 (1980) 9

OTHER AUTHORITIES

Alaska Native Land Claims: Hearings on H.R. 3100, et al., before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess. 128-29 (1971) 27

Alaska Native Land Claims: Hearings on § 2906, et al. before the Senate Comm. on Interior and Insular Affairs, 90th Cong., 2d Sess. 2-16 (1963) 25

DOI Opinion, Governmental Jurisdiction of Alaska Native Villages Over Land and Non-members, Sol. Op. M-36975 (January 11, 1993) 25

H.R. Conf. Rep. No. 92-746 at 40, 92d Cong., 1st Sess. (1971), *reprinted* at 1971 U.S.C.C.A.N. Vol. 2, p. 2247 28

H.R. Rep. No. 92-523 at 9, 92d Cong., 1st Sess. (1971), *reprinted* at 1971 U.S.C.C.A.N. Vol. 2, p. 2191 .....23, 28

Hearing on S. 1196 before the Senate Comm. on Indian Affairs, 72d Cong., 1st Sess. 15-16 (1932) 20

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International Conservation Agreement between Canada and the United States on the Conservation of the Porcupine Caribou herd, T.I.A.S. No. 11259, July 17, 1987 17

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Pacific Salmon Treaty, Treaty between the United States and Canada, T.I.A.S. No. 11091 (January 28, 1985) 17

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Transcript of June 21, 1971 Executive Session of the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess. (1971). Record Group 233..... 27

INTERESTS OF AMICI

Amici are Alaska organizations whose members are united by their interests in protecting Alaska's natural resources and continuing successful conservation policies implemented under that State's constitution.[1] The decision below threatens those interests and resources by fracturing a system of state management in which Venetie and the other Native villages have participated and benefited along with all Alaskans.

The Alaska Fish and Wildlife Conservation Fund, Inc. ("Conservation Fund") is made up of approximately 1,200 individual members. The Conservation Fund's charter purposes include: educating the public on conservation of fish and wildlife resources, including the American hunting, trapping and fishing heritage; and litigating where necessary to protect natural resource rights enshrined in the Alaska Constitution. The Conservation Fund is an Alaska nonprofit charitable and educational organization (registered under IRC 501(c)(3)).

The Alaska Fish and Wildlife Federation and Outdoor Council, Inc., ("AOC") is a state-wide umbrella organization of 43 local member organizations representing over 10,000 members. (Those member associations are listed in Appendix A.) AOC's purposes include: protection of Alaska's renewable natural resources, advocating professional and scientific resource management, and participation in regulatory, legislative, judicial and public

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[1] No person other than Amici (including those shown in Appendix A) have made monetary contribution to the cost of preparing this brief and no party's counsel is author. This brief is filed with the consent of the parties and their letters of consent have been lodged with the Clerk of this Court.

policy processes affecting these resources, including equality in access to and use of these resources required under the Alaska and United States Constitutions. AOC is an Alaska nonprofit corporation (registered under IRC § 501(c)(4)).

Individual members interests range from bird watching, nature photography, and scientific study to hunting and fishing and wild food gathering. Many have historically depended on hunting, trapping, and fishing for a predominant supply of meat and fish (a lifestyle choice – sometimes a necessity – recognized by the Alaska Constitution and laws).

Amici have been recognized by courts to have standing to protect those resources and the environment of Alaska (*Alaska Fish & Wildlife Fed'n & Outdoor Counc. v. Dunkle*, 829 F.2d 933 (9th Cir. 1987) *cert. denied, sub. nom., Alaska Fed'n of Natives v. Alaska Fish & Wildlife Fed'n and Outdoor Counc., Inc.*, 485 U.S. 988 (1988). (AOC's interest in protection of migratory birds gives standing to seek injunction against the Federal Government permitting illegal out-of-season hunting); discussed in *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1395-97 (9th Cir. 1992) (noting that AOC had standing to challenge federal actions harming "aesthetic and environmental well-being" because of injuries to members "who wish to hunt, photograph, observe or carry out scientific studies.")

The holding of the Ninth Circuit that Venetie's 1.8 million acres are "Indian country" likely presages a similar conclusion as to 44 million other acres of Alaska transferred under the Alaska Native Claims Settlement Act, "ANCSA", Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. § 1601 *et seq.*) (1971). This immense acreage is scattered across Alaska and across

the migratory routes of important fish and wildlife resources ranging from salmon to caribou. The probable further result in the Ninth Circuit is that such "Indian country" will be held not fully subject to state conservation and management so that such natural resources may be decimated in disregard of Alaska law, whenever they are found in "Indian country" areas – often briefly while on annual migration.

The creation of one 1.8 million acre "Indian country" threatens to impede or destroy the unified, scientific management by the State of Alaska which has protected and restored such resources since the State assumed management, as guaranteed by the equal footing provision of the United States Constitution. The creation of Two Hundred Twenty-Six "Indian countries" could create a "management" disaster because of the migratory nature of most wildlife. Many fish runs, herd migration routes, and flyways pass through several separate ANCSA land areas. A repeat of the pre-statehood depletion of Alaska's salmon runs is the fear of Amici.

This probable result of the decision below conflicts with the promises made by Congress in the Statehood Act and ANCSA that Alaska would have full control over its own destiny and resources.

Alaska is miraculous and unique in many ways. It is the only state in which many wildlife resources have been greatly increased in the last half-century under state management, even in the face of pressure from increasing population and development, as well as great technological increase in the ability to harvest with powerful ocean fishing vessels, snowmobiles and high-powered weapons replacing traditional tools and weaponry. For only one notable example, salmon runs have grown to a recent

annual average catch of over 180 hundred million from an historic low of 25 million the year Congress granted statehood.

Judge Fernandez hinted at the threat to the interests of Amici, forecasting a:

> [B]lizzard of litigation throughout the state of Alaska as each and every tribe seeks to test the limits of its power over what it deems to be its Indian country. . . . include(ing) claims to freedom from state . . . regulation . . . assertions of sovereignty over vast areas of Alaska.

Ninth Circuit opinion, app. 1a to Pet. for Certiorari at 36a.

Confirming this threat, the counsel for Respondents have already announced conservation impacts of the decision below (which):

> will apply to virtually all other native villages. Specifically, the additional powers that the Tribe will have as a consequence of Indian country status include the authority to . . . manage fish and game (although the extent of such authority is unclear) . . .

NARF, *Indian Country in Alaska: The Venetie Decision*, in *Justice* at 1 (Spring 1997) quoted in State of Alaska Reply Br. for Pet., p. 2.

The wildlife resource and its management is a central issue in this litigation and litigation which will inevitably ensue if the decision of the Ninth Circuit is not reversed. For Amici, and most Alaskans, the primary interest is always the resource because the Alaskan way of life revolves around fish and wildlife.

In this key area of natural resource conservation, Congress has clearly authorized state, not federal, superintendence over Alaska lands, specifically including all ANCSA lands. The Native villages' interest are accommodated in this *state* system (and indeed Venetie and Arctic

Village continue to participate – and benefit – as provided by Alaska *state* law).

SUMMARY OF ARGUMENT

Our argument focuses on conservation of natural resources which is of primary import to Amici – and other Alaskans – and on Congress' confirmation of state authority.

While joining in the historical and statutory arguments of the State that ANCSA land is not "Indian country," we further illustrate how congressional direction of management and conservation of natural resources in Alaska historically did not involve special federal "superintendence" over the Natives. An exception which proves this rule is the Annette Island Reserve, created by statute for 800 Metlakatla Indians moved from Canada in 1887. Congress did provide some special federal control over this reservation, and fisheries. *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962). (This court still concluded the reserve was not "Indian country within the meaning of 18 U.S.C. 1151-53." *Id.* at 52.)

Decisions of this Court considering natural resources management before and after statehood confirmed the policy of treating Alaskans the same, with no *special* federal superintendence for Natives. *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1940) (special fishery for "natives and their licensees" invalid); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) (Alaska state laws banning fish traps may be applied to Indians).

The pre-statehood conservation policies of the Federal Government left much to be desired. The salmon

runs of Alaska were at a long-time historic low at the end of federal management and as a consequence of that management (*Organized Village of Kake*, concurring opinion of Douglas noting the disastrous impact of federally-authorized fish traps: "The Hearings . . . are replete with examples of the impact on people and the Alaska economy of the salmon depletion. This depletion also has a serious effect on wildlife." 369 U.S. at 82, n.5).

A policy of nondiscriminatory resource management was upheld by this Court, *Hynes*, supra, and was later enshrined in the Alaska Constitution, Art. VIII. Indeed, the *Hynes* decision of this Court has been cited and quoted by the Alaska Supreme Court as the source of Alaska constitutional Art. VIII, §§ 3, 15, 17. (*McDowell v. State of Alaska*, 785 P.2d 1, 6-9 (Alaska 1989)).

Congress expressly reiterated in the Alaska Statehood Act what is constitutionally required: that the State entered the Union "on an equal footing with the other States in all respects whatsoever" with all the powers and properties of the original states. Pub. L. No. 85-508, 72 Stat. 339 (1958). Among those powers, of course, are sovereignty over wildlife resources.

The Alaska Statehood Act also specifically provided that "Submerged Lands Act of 1953 [is] applicable to the State of Alaska and the said State [has] the same rights as do [other] States thereunder." Pub. L. No. 85-508 § 6(m), 72 Stat. 339, 340-41 (1958). That 1953 act transferred title and ownership of the lands beneath navigable waters *and* "the right and power to manage . . . said lands and natural resources, all in accordance with applicable State law. . . . to the respective States. . . . " *See*, also, *Idaho v. Coeur d'Alene Tribe of Idaho*, ___ U.S. ___, 117 S. Ct. 2028,

2040, et seq. (1997), (constitutional basis of equal footing doctrine).

The same year as statehood, the same Congress extended Public Law 280 jurisdiction to Alaska, 72 Stat. 545 (1958). The language of Public Law 280 included a potential exemption from State jurisdiction over wildlife matters by providing that nothing therein:

> [S]hall deprive any Indian or Indian tribe, band or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

118 U.S.C. § 1162(b).

In *Metlakatla*, 369 U.S. 45, there was a federal statute arguably providing federal authority over fishing (26 Stat. 1095, 1101, 48 U.S.C. 358). However, this Court held Alaska law did apply, further noting the statute argued to make an exception did not apply to other Natives "subjecting Metlakatla to rules and regulations of the Secretary of the Interior is *unusual*." *Metlakatla*, 369 U.S. at 53, emphasis added.

In the companion case *Organized Village of Kake*, 369 U.S. 69, this Court considered similar challenges by other Alaska Indians and concluded that the State's conservation laws did apply to all areas of Alaska.

Congress, through ANCSA, resolved any ambiguity and all remaining claims and in so doing terminated federal superintendence. As regards fish and wildlife management, ANCSA included three provisions. First, it revoked Native "reserves set aside either by legislation or

Executive or Secretarial Order" (Section 19).[2] Second, ANCSA extinguished aboriginal title or any aboriginal "hunting or fishing right" (Section 4(b)). Finally, it generally extinguished all other claims:[3]

> [A]ll claims against the United States or State- . . . based on claims of aboriginal right, title, use, or occupancy of land or water areas . . . or that are based on any statute or treaty of the United States . . . or based on the laws of any other nation.

ANCSA, Section 4(c).

This ANCSA settlement was expensive for the State of Alaska and her citizens. Five hundred million dollars of the moneys transferred to the Native Fund in consideration for the settlement were expressly to come from funds due to the State. In monetary terms, this was more than the federal budget contributed to the settlement fund (Section 9).

The lands – ultimately 44 million acres – could be selected by the village corporations and regional corporations and were also to be taken from land base which the State might otherwise claim.

The positive result was to reconfirm state jurisdiction over all these lands, and most importantly, continued state jurisdiction to manage and conserve the fish and wildlife and other natural resources for all Alaskans.

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[2] With the exception of Annette Island Reserve (Metlakatla), in Section 19(a) of ANCSA.

[3] The claim of "Indian country" herein was probably included.

From the pre-statehood "decline of Alaska salmon"[4] to under 25 million catch, State management has increased that catch to a recent average 186.6 million.[5]

The State management of the Venetie lands as part of the 34 million acres surrounding it which make up State GMU 25 has long been implemented with the participation of the village(s) through representation on committees established by state law for this purpose. (Venetie and Arctic Villages each have two representatives by state regulation.)

Congress expressed no intention that the Federal Government retain superintendence over the wildlife resources migrating over or living on ANCSA lands. These lands were all transferred to state-chartered corporations, in fee – subject to laws of the State as to trespass, wildlife, environmental and other regulation.

Access to these lands – and its restriction under trespass law – is also a matter of state law. The federal statute controlling hunting and fishing on "Indian trust lands" (18 U.S.C. § 1165) does *not* apply to ANCSA land.

More recently, Congress confirmed that no federal superintendence was extended to ANCSA lands when it enacted the Alaska National Interest Lands Conservation Act (ANILCA), No. Pub. L. 96-487, 94 Stat. 2371 (1980), avowedly to complete the process of land disposition in Alaska.

The Ninth Circuit has held that ANILCA implies some federal regulation over fish and wildlife on "public" or "federal" lands in Alaska therein described. *Alaska*

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[4] Cooley, R.A. 1963. Politics and conservation: The Decline of the Alaska Salmon. Harper and Row, New York.

[5] Savikko, H., Alaska Commercial Salmon Catches, Report of Alaska Dept. of Fish and Game, 1996 Supp.

v. Babbitt (Katie John), 54 F.3d 549 (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 272 (1995).

ANILCA defines "public lands":

> (2) The term "Federal land" means lands the title to which is in the United States after December 2, 1980.
>
> (3) The term "public lands" means land situated in Alaska which, after December 2, 1980, are Federal lands, except – [exception not relevant here]

ANILCA Sec. 102, 16 U.S.C. § 3102 (1980).

The Venetie lands were transferred from the United States to Native corporations in 1973 and still remain in fee ownership. The same is true of the ANCSA lands.

It is thus uncontested that Congress, through ANILCA did not allow any federal authority or superintendence over these lands. There is no suggestion, in statute or legislative history, even as interpreted by the Ninth Circuit, that any federal regulatory authority authorized by Congress under ANILCA extends to the Venetie lands at question, nor to any other of the 44 million acres transferred in fee pursuant to ANCSA. These are neither "federal land" nor "public lands" under the above-quoted statutory definition.

Thus ANILCA confirms, contrary to the decision below, that there is no *federal superintendency* over these lands in this most important subject area of natural resources and subsistence use. Rather, ANILCA attests Congress intended the State to continue such jurisdiction over ANCSA (fee) lands. The ANCSA lands are not "Indian country."

ARGUMENT

The case below will likely be applied to the 44 million acres of lands passed to Native corporation ownership under ANCSA. The circuit court has already held this decision provides: "the appropriate standard for determining whether a dependent Indian community exists." *Alyeska Pipeline Serv. Co. v. Kluti Kaah Native Village*, 101 F.3d 610, 613 (9th Cir. 1996).

In all of these lands, the State of Alaska has heretofore exercised jurisdiction over fish and wildlife, fulfilling its trust responsibility to restore and manage these resources for all Alaskans. This Court has long held such power is an essential historic power of states:

> We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as proprietor but in its sovereign capacity, as a representative and for the benefit of all its people in common.

Geer v. Connecticut, 161 U.S. 519, 530 (1896).

Later decisions held that the doctrinal basis is not "ownership" while reaffirming the States' police power:

> [C]ases are consistent in recognizing that the retained interests of States in such common resources as fish and game are of substantial legal moment, whether or not they rise to the level of a property right. . . . Barring constitutional infirmities, only a direct conflict with the operation of a federal law . . . will bar the state regulatory action.

Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 288 (1977) (Rehnquist, J., concurring in part and dissenting in part (citations omitted).

The Native villages have been, and remain, special participants in, as well as beneficiaries of, State management. Under Alaskan law, Committees are established to provide the regional resource management input for all Alaska and each specifically includes representatives of villages. Venetie, as well as Arctic Village has such representation under state law over state management on the lands involved in this case (as well as millions of acres of the adjoining lands which the villagers are free to use).

It was not historical accident, but reflects the priorities of Alaskans, that the same special election in which Alaskans ratified their new constitution ("Ordinance 1") they approved an Ordinance which prohibited the use of fish traps for the taking of salmon in Alaska waters ("Ordinance 3").[6]

Two decisions of this Court discussing fish traps, their effect on this one important natural resource, and the new State's efforts to cure the problem (in the face of federal authorization of contrary Native practices) are in *Metlakatla*, supra, and *Organized Village of Kake*, supra.

Fish traps are only one example of the destructive practices allowed under federal management of Alaska resources. In *Hynes*, the dissent had noted the "rapid and virtually unrestrained depletion and destruction of the fishery. . . . " Supra at 131.

The Federal Government does not have the same constitutional trust responsibilities as does the State here.

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[6] Ordinance 2 provided for the election of two United States Senators and one United States Representative.

Other political priorities may control and did so historically to the detriment of Alaska's resources.[7]

Congress was well aware of the problem and granted all power to Alaska necessary to conserve or restore the resources. As this Court said of a different statute: "The destruction of anadromous fish in our western waters is so notorious, that we cannot believe that Congress through the present Act authorized their ultimate demise." *Udall v. Federal Power Comm'n*, 387 U.S. 434, 437-8 (1967).

Statehood was followed by Public Law 280 jurisdiction for Alaska, and State jurisdiction over these lands was finally confirmed by Congress in ANCSA.

We have neither the rhetorical skill nor pages of brief to detail the natural resources involved. They have continued to thrive, and often increase, under the special system of state protection described below.

I. State Conservation Jurisdiction Includes – and Benefits – Venetie.

The Alaska Constitution was expressly approved by Congress and devotes an entire article to natural resources. That Congress thereby authorized and intended State control over fish and wildlife is separately confirmed by the provision of a one-year delay to allow the State to adopt its management and thereby fully replace federal management. (Alaska Statehood Act, Section 6 (e) discussed in *Metlakatla*:

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[7] Similar federal policies continue. *See Alaska Fish and Wildlife Fed'n & Outdoor Counc., Inc. v. Dunkle*, 829 F.2d 933 (9th Cir. 1987) (requiring Interior to comply with Migratory Bird Treaty Act but finding enforcement to be discretionary).

> When Alaska was established as a State, Congress withheld jurisdiction over her fisheries until she had made adequate provision for their administration. Fn. 2: " . . . Alaska adopted a comprehensive fish and game code on April 19, 1959, Alaska Law 1959, c. 94, *and received full control over her resources soon afterward.*"

Metlakatla, 369 U.S. at 47, including n.2 (emphasis added).

The first Alaska Legislature immediately adopted a comprehensive conservation code (including the ban of fish traps, previously approved by the people, Alaska Stat. 16.10.070). The code established a 15-member Board of Fish and Game to undertake the daunting project. The new agency had a "jump start" since the Territorial Legislature had funded a Department of Fisheries which, though without regulatory authority, had commenced research and study, including hearings to analyze the (failing) federal regulatory programs and create a better system.

Resource management authority is now shared between the Boards of Fisheries and Game. Alaska Stat. 16.05.221. The Board of Fisheries regulatory authority is found primarily in Alaska Stat. 16.05.251. The Board of Game has regulatory authority which extends to game, including birds, and is found primarily in Alaska Stat. 16.05.255.

After conservation, the first priority for consumptive use of Alaska's fish and game is subsistence. Alaska Stat. 16.05.258. This statute applies to each Board and requires each to identify fish stocks or game populations "customarily and traditionally taken or used for subsistence." A reasonable opportunity for all Alaskans to participate in subsistence is required (except in "non-subsistence" areas where "dependence upon subsistence is not a principle

characteristic of the economy, culture, and way of life. . . ." Alaska Stat. 16.05.258(c)). The Alaska Constitution requires that all Alaskans share in this benefit. (*See McDowell*, 785 P.2d 1 (Alaska 1989)).

The Fisheries and Game Boards are confirmed in joint legislative sessions and serve fixed and staggered terms, to assure independence and a kind of check-and-balance with the Commissioner of Fish and Game appointed by the Governor. Alaska is divided into 26 Game Management units ("GMU") reflecting the habitat and migration of the species of interest. Similarly, the Board of Fisheries has divided the State into 13 major regulatory areas for fishing. These areas are often further divided for fine-tuned regulation. *See*, generally, Alaska Admin. Code tit. 5 § 39.120.

An important management role is played by a statewide system of fish and game advisory committees (Alaska Stat. 16.05.260). These are established and their jurisdictional areas defined in permanent regulation, Alaska Admin. Code tit. 5, § 96.021.

The GMU in which this Venetie area is found is Unit 25, which is itself composed of 4 sub-areas (Alaska Admin. Code, tit. 5 § 92.450(25)(A, B, C, D)). A map of this area as adopted is attached as Appendix B for ease of reference.

GMU 25 encompasses the Yukon River basin upstream from Hamlin Creek. The northern boundaries of area GMU 25 A, B and D are the Phillip Smith Mountains and Davidson Mountains, and the western is the Canadian border. Area 25 encompasses 53,116.9 square miles or 34 million acres, of which the Venetie area is 1.8 million. (*See*, App. B, GMU 25 map).

Management for GMU 25 is within the authority of several Advisory Committees (Alaska Admin. Code, tit. 5 § 97.005 (vii). Of those, the "Yukon Flats" Committee generally deals with 25A, which includes the Venetie lands herein and surrounding lands.

By state regulation, the Yukon Flats Advisory Committee specifically includes delegates from *both* villages which make up Venetie: "Arctic Village two representatives . . . [and] Venetie two representatives" as well as two each from several other Native villages, all of which are located in the management area. Alaska Admin. Code tit. 5 § 96.216(D).

These advisory committees are required to be "well informed on the fish or game resources of the locality . . . hold public hearings and forward regulatory recommendations to the Boards aforementioned." Alaska Stat. 16.05.260. The statute also allows the Advisory Committees to be delegated authority to make in-season emergency changes. Alaska Stat. 16.05.260. (This is infrequently done).

The Commissioner has authority to adopt "Emergency Orders" such as closing fisheries and other seasons (Alaska Stat. 16.05.060). The Commissioner may also "set aside and make null and void [the] opening of seasons set by the advisory committees." Alaska Stat. 16.05.260.

This is a complex system, historically evolved to meet the needs of the resource and of all Alaskans. The complicated nature of management of migrating species is illustrated in the recent decision of *Stepovak-Shumagin Set Net Ass'n v. State of Alaska, Bd. of Fisheries*, 886 P.2d 632 (Alaska 1994). The salmon regulation in question was proposed by an advisory committee (including Native village representatives) and amended through hearing. It

affected numerous runs of salmon, of several species and rivers of origin, as well as competing fishing gear types and competing interests from two Native villages (each with representation on that area's committee under state law).

The need for unified state management is illustrated by this case. The Venetie area in question seems huge, 1.8 million acres, but it is only a part of the habitat area for wildlife populations (generally, GMU 25; as shown in Appendix B). As with other areas to which Native corporations were granted title as part of ANCSA, the Venetie area straddles migratory routes of fish, especially salmon, big game and birds. All these resources spend only a small part of their lives in the Venetie area. Species of illustrative interest which pass through the Venetie area include Yukon River salmon, moose and the Porcupine herd of caribou.

Venetie (village) is located on the north side of the Chandalar River about 45 miles from the confluence with the Yukon River, and the Venetie area extends to that river. Salmon fisheries in the Yukon River include king and chum salmon. These salmon are of particular significance since many Yukon chinook spawn in Canada. The chinook salmon runs are subject of negotiated management and recurring dispute with that Nation. (*See* Article VIII to the Pacific Salmon Treaty, Treaty between United States and Canada, signed at Ottawa January 28, 1985, T.I.A.S. No. 11091, which article specifically deals with the Yukon River salmon.)

Also of special interest is the renowned Porcupine caribou herd, which use GMU 25 and the Venetie area for some part of each year. The international scope of the

Porcupine herd's importance is also reflected in an "International Conservation Agreement between Canada and the United States on the Conservation of the Porcupine Caribou herd," signed at Ottawa, July 17, 1987 (T.I.A.S. No. 11259).

Harvest management is just one element of the State's responsibilities under the Alaska Constitution to protect the resources and environment for the benefit of all Alaskans. The decision below could displace not only fish and wildlife management but a panoply of state environmental and habitat statutes and regulations.

One less obvious example is the creation and enforcement of environmental standards, which will be blocked by the existence of "Indian country." The Ninth Circuit has held a state may not enforce air or water quality standards in Indian country. (*Washington Dep't of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985). There is *no* present authority to supplant the State's efforts in this subject area.

We have noted only a few examples of important Alaskan resources which may not survive disruption of state management: salmon runs and such migratory ungulates as the Porcupine caribou herd. Numerous other species of fish and wildlife such as moose owe their health and survival to the system of unified management by the State of Alaska and would be threatened by the "Balkanization" charted by the decision below.

II. History of Wildlife Management Confirms State Authority: Congress Extinguished All Sources of Federal Superintendency.

The State of Alaska has summarized the jurisdictional history and shown there is no "Indian country." We

shall briefly focus on wildlife management to show that Congress generally did not provide special or exclusive Indian rights in wildlife, even before statehood. After statehood, Congress has repeatedly confirmed the jurisdiction of the State in this subject area and extinguished any claim of federal superintendence.

When the Territorial Organic Act provided for the formation of a territorial legislature in 1912, the laws applied equally to all persons in Alaska. (Pub. L. No. 62-334, 37 Stat. 512 (1912)). However, among the subjects excluded was wildlife management.

Management of these important resources was temporarily retained in the Federal Government. The need for conservation was early apparent:

> Commercial salmon fishing has become vital for Alaska's economy, but its exploitation seriously threatened the resource even before the turn of the century. See Gruening, The State of Alaska (1954), pp. 75, 97. Congress in 1889, in 1896, in 1906, and again in 1924 enacted conservation measures, prohibiting any obstruction of waters to impede salmon migration, limiting the times and means of taking salmon, and authorizing the appropriate department to impose further restrictions.

Metlakatla, 369 U.S. at 46-47.

Each of these early federal conservation measures, as well as the Criminal and Civil Codes for Alaska, enacted by Congress were equally applicable to Natives as well as non-Natives (*See, e.g.*, 30 Stat. 1253 (1899) and 31 Stat. 321 (1900)).

The lack of local control (and real enforcement) proved to be an increasingly glaring error, as the mismanagement of the resources became more and more apparent (*see, e.g., Hynes*, infra, referring to "the rapid and

virtually unrestrained depletion and destruction of the fishery." 337 U.S. at 131.

The general applicability in Alaska of all laws was further confirmed in 1924 when Congress granted Alaska Natives citizenship. Pub. L. No. 68-253, 43 Stat. 253 (1924).

That same year, Congress enacted the last of the federal "conservation measures," noted above in *Metlakatla*, 369 U.S. 45. The White Act, 43 Stat. 464 (1924), authorized federal regulation of Alaska fisheries, but there was no separate provision for Natives and, indeed, that Act prohibited any special rights. (Construed by this Court, it became a model for Alaska Constitution Art. VIII. *See McDowell v. State of Alaska*, 785 P.2d 1 (Alaska 1989).)

In 1932, the Secretary of Interior advised Congress: "In the United States statutes Alaska has never been regarded as Indian country. Letter from Ray Lyman Wilbur to the Hon. Edgar Howard (March 14, 1932, *reprinted* in *Hearing on S. 1196 before the Senate Comm. on Indian Affairs*, 72d Cong., 1st Sess. 15-16 (1932).

Subsequent to the enactment of the definition in 18 U.S.C. § 1151 (1949), Executive Branch agencies consistently adhered to the view that Congress did not intend the "Indian country" definition to apply to Alaska.

In 1940, this Court considered the 1924 White Act in *Hynes*, 337 U.S. at 86, and concluded that the Act did *not* authorize a federal regulation of the Secretary of Interior permitting Natives special fishing rights, or treating them different:

> [W]e think it clear that its proviso, "that no exclusive or several right of fishery shall be granted therein," applies to commercial fishing by Natives equally with fishing companies, nonresidents of Alaska or other American citizens

> and so applies whether those Natives are or are not residents on a reservation. We find nothing in the White Act that authorizes the Secretary of Interior to grant reservation occupants the privilege of exclusive commercial fishing rights. . . . "Exclusive," as used in Section 1 of the White Act, forbids not only a grant to a single person or corporation but to any special group or number of people.

Hynes, 337 U.S. at 122.

Even though this Court concluded that coastal waters (3000 feet around) could be added to the "reservation," the Court found *no* special federal superintendence (or dependence), which would justify special regulation. Neither the majority nor dissenting opinion suggested that such areas were "Indian country."

In 1958, an Assistant Secretary of the Interior Roger Ernst represented to Congress: "(T)he general understanding had been that the many Native villages in Alaska were not Indian country,. . . . " Letter from Roger Ernst to the Hon. Emanuel Culler (February 25, 1958), *reprinted* in S. Rep. No. 1872, 85th Cong., 2d Sess. 3 (1958), *reprinted* in 1958 U.S.C.C.A.N. Vol. 2, p. 3347.

The same year, the 85th Congress enacted the Alaska Statehood Act. Pub. L. No. 85-508, 72 Stat. 339 (1958). At no time during those hearings was it argued that the land reserves made for the benefit of Alaska Natives were "Indian country." In the Alaska Statehood Act, Congress confirmed the general proposition the new state would have jurisdiction over all lands and citizens.

This Court considered the Statehood Act, Public Law 280, and several argued disclaimers and exemptions, ultimately concluding the State of Alaska had received complete jurisdiction in the companion *Metlakatla* and *Kake*

cases. This Court even confirmed with respect to Metlakatla a district court conclusion "the Reserve was not Indian country, within the meaning of 18 U.S.C. § 1151." *Metlakatla* at 52.

As Congress intended, all Alaska residents and all lands were to be generally subject to the jurisdiction of the Alaska State Legislature. After one year, the same was specifically to be true for all fish and wildlife matters.

This Court's decision in *Metlakatla* had discussed the argument that activities within the boundary of a reservation could be argued not subject to state jurisdiction where a "federal treaty, agreement or statute" provided "hunting, fishing or trapping" "right, privilege or immunity." Citing Pub. L. 280, 18 U.S.C. § 1162 (1970). ANCSA resolved these claims to make abundantly clear all such activity by all Alaskans would be subject to state management.

This was done by revoking the reservations and any "claim" of use or occupancy, and by expressly extinguishing hunting and fishing rights. *Id.* Thus, no Public Law 280 exemption would apply.

Thus when it enacted ANCSA, the 92d Congress reaffirmed full state jurisdiction over fish and wildlife on these lands.

III. The Alaska Native Claims Settlement Act Was Final Extinguishment of Indian Country And Confirmed State Jurisdiction Over Wildlife.

In 1971, the 92d Congress enacted ANCSA, Pub. L. No. 92-203, 35 Stat. 688 (codified as amended at 43 U.S.C. § 1601 *et seq.*) (1971). In exchange for the 44 million acres of land and $965.5 million, section 4 of ANCSA "extinguished" all Native claims in Alaska.

ANCSA was referred to by Congressional Report as a "generous grant by almost any standard."[8] As argued by the State of Alaska, the express provisions of ANCSA, as well as its legislative history, confirm that there remains no Indian country in Alaska.

Because fish and wildlife resources and their use is an important separate component of such analysis, we write separately to articulate why this conclusion is doubly true. ANCSA provided for extinguishment of claims of use and occupancy and finally, and expressly extinguished hunting or fishing rights:

> (b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and *including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.*

85 Stat. 690, § 4(b), emphasis added.

Of particular relevant importance, the Act went on to separately extinguish any "claims" against the State:

> (c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use or occupancy of land or water areas in Alaska or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation,. . . .

85 Stat. 690, § 4(c).

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[8] Noting that over 40 million acres and nearly $1 billion were provided for approximately 40,000 Natives living in villages and 55,000 total at 2195 H. R. No. 92-523, 92d Cong., 1st Sess. (1971), *reprinted* in 1980 U.S.C.C.A.N. 2195.

This was a most important part of the consideration for ANCSA's "generous grant by almost any standard." This section, alone, should end this "claim . . . against the State" that Venetie is "Indian country." There was more, however.

ANCSA also expressly revoked all (any) reservations, in Alaska, save Metlakatla. "Notwithstanding any other provision of law, . . . the various reserves set aside by legislation or by Executive or Secretarial Order for Native use or for administration of Native affairs, . . . are hereby revoked." ANCSA, § 19(a).

The revocation of the Venetie reservation should alone be sufficient effective to conclude it is no longer "Indian country." Congress has set forth three alternatives to qualify as Indian country. When it expressly *revokes* that status under the primary definition, courts may not reinstate the status where Congress has not chosen to do so:

> If the reservation has been diminished, then [the land] within the historical boundaries of the reservation is not in "Indian country."

Hagen v. Utah, 510 U.S. 399, 401 (1994).

Thus, ANCSA provided a final answer to claims that hunting and fishing were somehow exempt from state jurisdiction and reaffirmed long standing policy that Alaska Natives were Alaskans and subject to the jurisdiction of the Alaska Legislature as was the land within and surrounding villages.

Congress also rejected several proposals when it considered ANCSA. One is noteworthy because it was proposed by the Alaska Federation of Natives, and recommended that "Native groups" be afforded the "option to incorporate under the Indian Reorganization

Act as an alternative to incorporation under Alaska law." This alternative also proposed that Native groups be given the option of having title conveyed "in fee simple to a trustee for the native group." § 2904, 90th Cong. 2d Sess (1965), *reprinted* in *Alaska Native Land Claims: Hearings on § 2906, et al. before the Senate Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 2-16 (1963).

After the passage of *ANCSA*, Venetie made a similar request to Interior to take this same land into trust, and Interior rejected the request concluding: "In light of the clear expression of congressional intent in ANCSA not to create trusteeship or a reservation system, it would be an abuse of discretion; for the Secretary to acquire lands in trust." DOI Opinion, Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers, Sol. Op. M-36975, p. 112, n. 276 (January 11, 1993).

In ANCSA, Congress had rejected such trust proposals and other models of "Indian country" known and available from the lower 48 states. Instead, Sections 7(d) and 8(a) of ANCSA required Alaska Natives to organize corporations "under the laws of the State [of Alaska]." Section 14 then required the Secretary of the Interior to issue patents to state-chartered corporations which conveyed title to the land in fee simple (not trust).

Section 14(c)(3), applicable to most other villages, even required the village corporation to reconvey fee title to "no less than 1,280 acres" within the village either "to any Municipal Corporation in the Native Village or to the State in trust for any Municipal Corporation established in the Native village in the future."

This is an expression by Congress of intent that not only the Alaska State Legislature but even political subdivisions could exercise jurisdiction over the core of ANCSA-conveyed land.

Both the concurring opinion of Judge Fernandez below and the Amicus Brief of Shee Atika Corporation note the drastically inconsistent result if a tribal government were allowed to assert authority over ANCSA lands as "Indian country" and to control or even tax the Native corporations which now own the lands. As Shee Atika notes the members and beneficiaries while often overlapping are *different*. The lands and corporation stock could easily be rendered valueless either by tribal assertion of land-use control, or tax. (*McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)). At least theoretically, non-members of the tribe could be argued not entitled to hunt and fish on lands of which they are part owners: an absurd or at least problematic system.

The legislative history further supports the conclusion that no "Indian country" remained. There is no mention of "Indian country" nor citation to 18 U.S.C. § 1151, a remarkable oversight if Congress' intent was to create or continue "Indian country."

When Alaska Governor Egan testified on H.R. 3100, the precursor to H.R. 10367, the Governor made clear one primary interest of the State; that there must be no remaining impediment to state jurisdiction over natural resources:

> No Native claim to this land should be immune to the 'zoning' powers of the state, *from jurisdiction over fish and game, water or air quality, or any other policy, natural resource or environmental regulation.*

Alaska Native Land Claims: Hearings on H.R. 3100, et al., before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess. 128-29 (1971) (emphasis added). Those concerns were shared by the Congressional leaders as the following colloquy between chairman Aspinall and Representative John Kyl demonstrates:

> Kyl: I would like to guarantee as far as possible that there is no possibility that these Native reservations will be considered at any time in the future as Native reservations or Indian reservations, knowing the tremendous problems that we have because of the Indian reservations in the forty-eight adjacent states. And there is a possibility – yes?
>
> Aspinall: This troubles me, too, because it seems that the only possible way that we can do this is to find that these villages, wherever they may be, before they can take, must be incorporated under the laws of the State of Alaska which would be final determination of their position . . .
>
> . . .
>
> In other words, what my colleague is saying, *if the State of Alaska has any laws on the maintenance of, enhancement of, protection of ecological values, then these citizens of Alaska should conform in these respects, too, is that correct?*
>
> Kyl: *Yes.*

Transcript of June 21, 1971 Executive Session of the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess. (1971). Record Group 233. Center for Legislative Archives. National Archives. Washington, D.C. (emphasis added).

The House Committee on Interior and Insular Affairs included what became section 2(b) of ANCSA and explained in its Report that:

> The bill does not establish any trust relationship between the Federal Government and the Natives. The regional corporation and the village corporations will be organized under State law, and *will not be subject to Federal supervision* except to the limited accent specifically provided in the bill. All conveyances of land will be in fee – not in trust.

H.R. Rep. No. 92-523 at 9 (emphasis added), 92d Cong., 1st Sess. (1971), *reprinted* at 1971 U.S.C.C.A.N. Vol. 2, p. 2191. As frequently noted, with respect to fish and game, the supervision is state.

The House-Senate Conference Committee which sponsored the final version also prepared a Joint Statement which emphatically concluded: "Subsection 2(g) of the Conference Report is to be strictly construed and the Conference Committee does not intend that the lands granted to the Natives under this Act be considered 'Indian reservation' lands for purposes other than those specified in this Act. The lands granted by this Act are not 'in trust' and the Native villages are not Indian 'reservations.' H.R. Conf. Rep. No. 92-746 at 40, 92d Cong., 1st Sess. (1971), *reprinted* at 1971 U.S.C.C.A.N. Vol. 2, p. 2247. These were both parts of Indian country definition, of course.

The history confirms both the specific argument that State jurisdiction over natural resources was intended, and the general conclusion that "Indian country" – or federal superintendence – was not intended by Congress.

When ANILCA was adopted in 1980, Congress further confirmed this by asserting federal jurisdiction (if at all) only over public lands, defined as "lands situated in Alaska, which after December 2, 1980, are Federal lands . . . [which] means lands *the title to which is in the United States*. . . . " ANILCA § 102, 16 U.S.C. 3114 (1980), (emphasis added).

The Ninth Circuit has given the term "federal land" an expansive interpretation holding it includes some navigable waters in which the United States has reserved water rights.[9] *Alaska v. Babbitt*, 54 F.3d 549. The same decision has also left standing a district court decision that federal regulatory authority over such lands could be implied. *Alaska v. Babbitt*, at p. 554, n.2 (It is probable, but not here relevant since those are *not* ANCSA lands, that state regulation over public lands is at least concurrent.)

ANCSA lands are simply *not* covered by ANILCA's definition of "federal lands" because these are fee lands. This confirms Congress asserted *no* federal control or "superintendency." This is final confirmation Congress did not intend these lands to be "Indian country."[10]

---

[9] The Alaska Supreme Court has reached the contrary result. *Totemoff v. State*, 905 P.2d 954, 962 (Alaska 1995).

[10] A search of the legislative history of ANILCA also discloses no reference to "Indian country" as defined in 18 U.S.C. § 1151.

CONCLUSION

For the reason set forth above, and in the Brief of Alaska, the decision of the Ninth Circuit should be reversed.

DATED this 21, day of August, 1997.

Respectfully submitted,

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Attorney at Law

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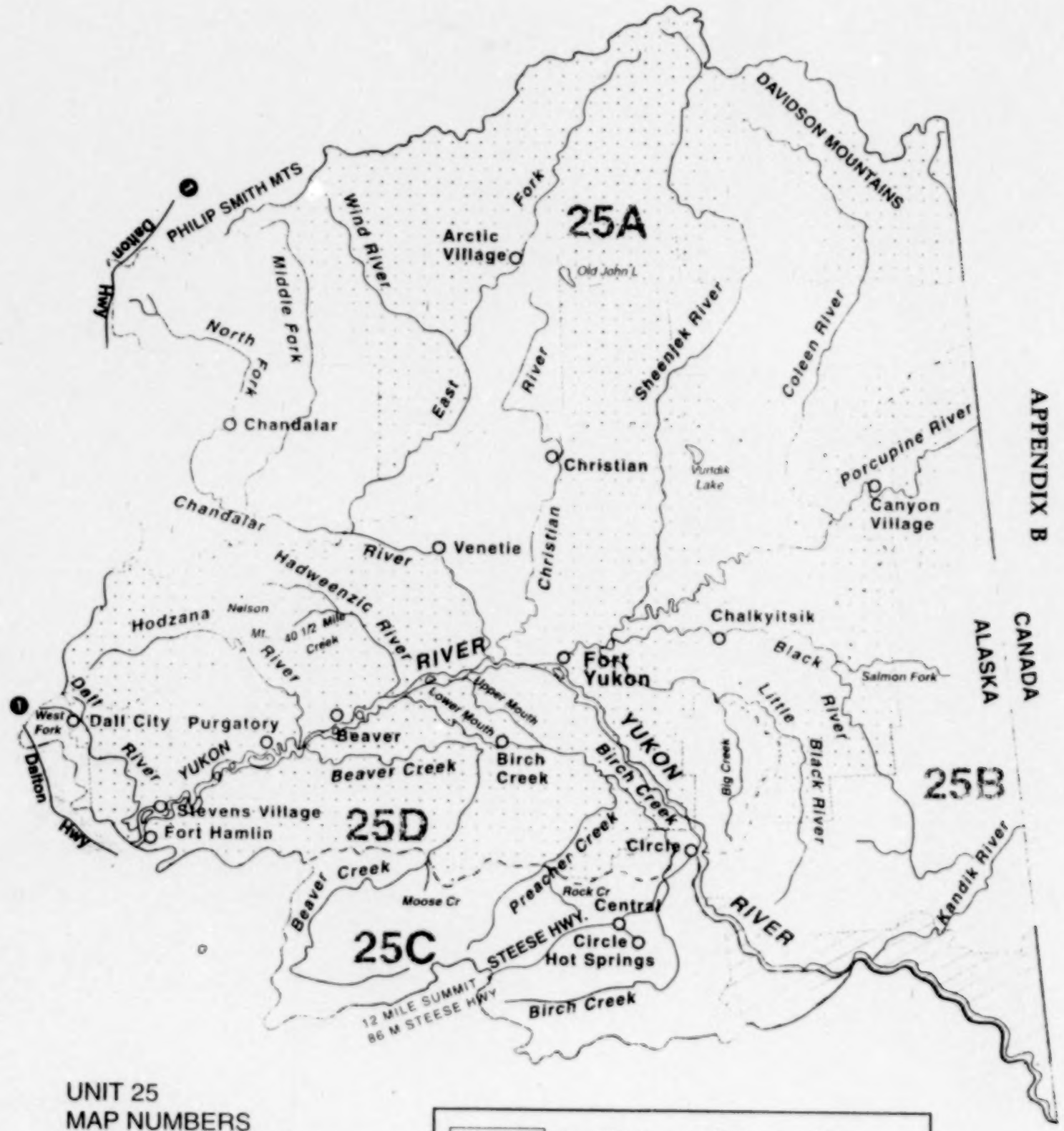
APPENDIX A

ALASKA FISH & WILDLIFE FEDERATION AND OUTDOOR COUNCIL, INC.

Alaska 2nd Amendment Coalition	Fairbanks
Alaska Boating Association	Anchorage
Alaska Competitive Shooters Organization	Anchorage
Alaska Falconers Association	Juneau
Alaska Frontier Trappers Association	Palmer
Alaska Rifle Club	Eagle River
Alaska State PITA	Juneau
Alaska State Snowmobile Association	Anchorage
Alaskan Bowhunters Association, Inc.	Anchor Pt
Alaskan Marine Dealers Association	Anchorage
Alaskan Waterfowl Association	Anchorage
Anchorage Snowmobile Club, Inc.	Anchorage
Blacksheep Bowmen	Elmendorf AFB
Chitina Dipnetters	Fairbanks
Clear Sky Sportsmen's Club	Clear
Cleveland Peninsula Users Coalition	Ketchikan
Cook Inlet Archers	Anchorage
Delta Sportsmen's Association	Delta Junction
Fairbanks Practical Pistol Club	North Pole
Fairbanks Retriever Club	Fairbanks
Fairbanks Snow Travelers Association	Fairbanks
FNAWS/Alaska Chapter	Anchorage
Golden North Archery Association	Fairbanks
Interior AK Gun Dog Association	Fairbanks
Interior Alaska Airboat Association	Fairbanks
Interior Alaska Trail Riders Association	Fairbanks
Interior Alaska Wildlife Association	Fairbanks
Juneau Rifle & Pistol Club	Juneau
Ketchikan Sports & Wildlife Club	Ketchikan
Ketchikan Volunteer Rescue Squad	Ketchikan
Matanuska Valley Sportsmen's Association	Palmer
Ruffed Grouse Society/SC AK Chapter	Anchorage
Safari Club International/AK Chapter	Anchorage

Safari Club International/Kenai Chapter	Soldotna
Sitka Sportsmen's Association	Sitka
Slana Alaskans Unite	Slana
South Peninsula Sportsmen's Association	Homer
Stikine Sportsmen's Association	Wrangell
Tanana Valley Rifle & Pistol Club	Fairbanks
Tanana Valley Sportsmen's Association	Fairbanks
Territorial Sportsmen, Inc.	Juneau
Tok Shooter's Association	Tok
Tongass Sportfishing Association	Ketchikan

APPENDIX B



UNIT 25
MAP NUMBERS AND RESTRICTIONS

❶ Motorized Vehicle Restrictions
Bow and Arrow Only

NORTH

0 20 40
MILES

- Game Management Unit Boundaries
- Subunit Boundaries
- Special Restrictions in State Regulation
- National Preserves
- National Wildlife Refuge

Note: Individual Maps are not necessarily the same scale.

(As defined in Alaska Admin. Code tit. 5, 92.450)

Supreme Court, U.S.
FILED
AUG 21 1997
CLERK

No. 96-1577

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

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NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *et al.*,
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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit correctly held that land that is the subject of the Alaska Native Claims Settlement Act may constitute Indian country within 18 U.S.C. § 1151(b).

2. Whether the Ninth Circuit correctly held that the determination whether land is Indian country within § 1151(b) should depend upon an *ad hoc*, six-part balancing test incapable of producing predictable results.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

No. 96-1557

STATE OF ALASKA,
Petitioner,
v.
NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

Amici's interest in this case is two-fold. First, it presents a jurisdictional question of significance to many States: the legal standard that governs the delineation of "Indian country" based upon "dependent Indian communities." To

make this determination, the court of appeals fashioned a six-part balancing test that has no basis in statute or this Court's jurisprudence and that renders uncertain the sovereignty over much of Alaska and Indian-occupied lands in other States as well.

In addition, this case presents a question of utmost importance to the State of Alaska and to local governments in the State: whether the court of appeals correctly held that a huge expanse of land in north-central Alaska is "Indian country." The question whether the court of appeals was correct in holding that lands subject to the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1629e ("ANCSA"), can be "Indian country" is important not only for the 1.8 million acre region over which the Native Village of Venetie asserts jurisdiction, but also for other areas of the State that are potentially subject to assertions of jurisdiction by more than 225 other Native villages.

Because of the importance of the issues presented to *amici* and their members, *amici* submit this brief to assist the Court in the resolution of this case.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The areas of Alaska at issue have always been considered by that State to be subject to its general jurisdiction without impairment. The 1.8 million acre tract is neither an Indian reservation nor an Indian allotment, and all claims of aboriginal title were extinguished by ANCSA. Title to the disputed area is not held by the United States in trust but rather is held in fee simple and is freely alienable. The question at hand is whether this land is "Indian country" where Indian and not state sovereignty governs for many purposes. *See* U.S. Const. art. I, § 8, cl. 3 (Indian Commerce Clause); *Worcester v. Georgia*,

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

31 U.S. (6 Pet.) 515 (1832); *Williams v. Lee*, 358 U.S. 217, 219 n.4 (1959).

2. Use of the term "Indian country" for purposes of delineating jurisdiction has had a long history in this Court's jurisprudence. From the first usage in the Act of May 19, 1796, 1 Stat. 469, to this day, the term has been the touchstone for allocating sovereign power between the federal government and tribes on the one hand and States on the other. The scope and reach of the term has been left by Congress largely in this Court's hands. The early history is ably canvassed by Justice Miller's opinion for the Court in *Bates v. Clark*, 95 U.S. 204 (1877), and by Justice Matthews' opinion for the Court in *Ex Parte Crow Dog*, 109 U.S. 536 (1883). The current statutory definition of "Indian country" is found in Section 1151 of Title 18 of the United States Code, and explicitly applies only to part of that Title. However, this statute was adopted by Congress in 1948 as a recitation of this Court's jurisprudence and in that vein it has been applied for general purposes. The Section defines "Indian country" as consisting of (a) "Indian reservation[s] under the jurisdiction of the United States Government," (b) "dependent Indian communities," and (c) "Indian allotments, the Indian titles to which have not been extinguished."

3(a). This Court has not addressed the meaning of the phrase "dependent Indian community" since Section 1151 was enacted in 1948. The phrase is derived from this Court's rulings in *United States v. Sandoval*, 231 U.S. 28 (1913), and *United States v. McGowan*, 302 U.S. 535 (1938). Also instructive is *United States v. Pelican*, 232 U.S. 442 (1914), a case decided in the same term as *Sandoval*. Those decisions refer to federal "protection of a dependent people" living in "designate[d]" areas under the "supervision and guardianship of the United States." *McGowan*, 302 U.S. at 538.

(b). As *Pelican* instructs, a "dependent Indian community" exists where Congress explicitly "set[s] apart" land "for the use of the Indians as such, under the super-

intendence of the [Federal] Government." *United States v. Pelican*, 232 U.S. at 449. The federal set aside must be for the purpose of fostering a semi-autonomous Indian community. Moreover, federal superintendence over the Indian community must be active and pervasive. Both elements must be present and both must demonstrate a federal sovereign presence, not just federal activity, that displaces state sovereignty that otherwise would exist.

(c). This test provides a significant measure of predictability in an area where certainty of application is essential. By contrast, the Ninth Circuit's six-part balancing test would detach the meaning of "dependent Indian communities" from its historical basis in this Court's jurisprudence. As demonstrated by this case, the Ninth Circuit's test could be invoked to annul the States' sovereign powers, shifting that power to Indian groups even where the federal government declines to exercise supervision over them. The test thus threatens to upset the settled expectations of the States, and non-Indians who reside and do business in such areas.

4. The Ninth Circuit also ignored the special role of Natives in Alaska's history, which contrasts sharply to that of Indians in the lower 48 States. Since the days of Russian settlement, Native Alaskans generally have not been treated as comprising tribal entities that exercise sovereignty over an "Indian country." *See Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988). With the adoption of ANCSA in 1971, the few Native reserves created in the Alaska Territory were explicitly extinguished, excepting only the Annette Island Reserve of the Metlakatla, along with Native claims of title. ANCSA also expressly disavows creation or continuation of any trusteeship or wardship on the part of the Federal Government for Natives. Thus, Alaska's special history and ANCSA provide a compelling basis for the conclusion that there is no Indian country in Alaska.

ARGUMENT

I. A "DEPENDENT INDIAN COMMUNITY" DOES NOT EXIST ABSENT A SHOWING THAT LAND HAS BEEN "VALIDLY SET APART" BY EXPLICIT CONGRESSIONAL ACTION FOR THE USE OF AN INDIAN TRIBE UNDER FEDERAL SUPERINTENDENCE

This Court has long recognized that Congress' exclusive power over commerce with the Indian tribes may curtail the exercise of state sovereignty to the extent that state jurisdiction is determined to interfere with a competing federal interest. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Williams v. Lee*, 358 U.S. 217, 219 n.4 (1959) (discussing the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3). Congress has traditionally articulated the federal interest in regulation of the Indian tribes through statutes which by their terms operate within "Indian country"—in most cases leaving for the courts the task of delineating the boundaries of such "Indian country." *See Ex Parte Crow Dog*, 109 U.S. 556 (1883); *Bates v. Clark*, 95 U.S. 204 (1877) (construing meaning of "Indian country" in Revised Statutes § 2145 subsequent to repeal of definition of "Indian country" set forth in Indian Intercourse Act of June 30th, 1834).[2] Now the definition of "Indian country" serves as the touchstone for designating those geographic areas in which the Indian tribes, as a consequence of Congress' exclusive power respecting Indian affairs, retain certain attributes of their aboriginal tribal sovereignty as against the States. *See, e.g., Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Williams v. Lee*, *supra*.

[2] The operative term "Indian country" has been used in statutes enacted as early as 1796. *See* Act of May 19, 1796, 1 Stat. 469, 471, § 10 (prohibiting and specifying penalty for "purchasing a horse or horses . . . in the Indian country").

In some cases (*e.g., Sac and Fox Nation*) the Court has taken the requisite definition from 18 U.S.C. § 1151 (which by its terms applies only to chapter 53 of Title 18 of the U.S. Code); in other cases (*e.g., Citizen Band Potawatomi Indian Tribe*) the Court has not relied on Section 1151 but on its own precedents delineating the boundaries of "Indian country."

For these purposes, "Indian country" has meant either a reservation or something functionally equivalent to a reservation. The Ninth Circuit's holding takes a historically limited category of "Indian country"—that of "dependent Indian communities" found in the Pueblo and in a special federal "colony"—and expands it into an untenably broad principle of Indian autonomy that displaces state authority even where Congress has manifested a purpose that is expressly to the contrary. While acknowledging that this Court "has stressed the importance of an inquiry into whether tribal land was set aside by the federal government and whether the Natives who inhabit it are under the superintendence of the federal government," the court of appeals concluded "that these requirements should be construed broadly." Pet. App. 10a. It thus held "that the fact that a tribe holds title to land in fee simple, without any restrictions on alienation imposed by the federal government, should not in itself preclude a finding that the land was 'set aside' by the government." *Id.* at 11a. And it further asserted, quite erroneously, that the district court erred in requiring "that federal superintendence must be 'pervasive,' " in order to find that an area is Indian country. *Id.*

The Ninth Circuit indiscriminately recasts the traditional requirements of federal "set aside" and "superintendence" in a manner which, if affirmed, is likely to prompt numerous groups of Indians thought to hold land under general state jurisdiction to seek judicial declarations that they constitute "dependent Indian communities," which are entitled to exercise the prerogatives of sovereignty on such lands. Not only does the court of appeals' holding portend dire consequences for the exercise by States and local governments of their criminal, civil and regulatory jurisdiction, it also upsets the settled expectations of businesses which operate within, and non-Indians who live in, these areas. The Court should therefore clarify that "Indian country" in the form of a "dependent Indian community" exists only when Congress has expressly stated that the area is being "set apart for the use of the Indians under the superintendence of the [Federal] Government." *United States v. McGowan*, 302 U.S. 535, 539 (1938) (quoting *United States v. Pelican*, 232 U.S. 442, 449 (1914) (emphasis in original deleted)).

A. "Dependent Indian Communities" Can Exist Only Where There Is An Explicit Federal Set Aside Of Land With Federal Superintendence Of The Tribal Community

When Congress enacted 18 U.S.C. § 1151 in 1948, it intended to codify this Court's precedents interpreting the term "Indian country." [8] *See* Reviser's Note to Section 1151 ("Definition [of Indian country] is based on latest construction of the term by the United States Supreme Court in *U.S. v. McGowan*, following *U.S. v. Sandoval*.") (other citations omitted).

The term "dependent Indian communities" must thus be understood against the background of this Court's de-

[8] Section 1151 provides:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151.

cisions. "Indian country" has, of course, always included Indian reservations, a term which since the 1850's has referred to lands set aside under federal protection for the residence of tribal Indians. *See Donnelly v. United States*, 228 U.S. 243, 269 (1913) ("[N]othing can more appropriately be deemed 'Indian country,' . . . than a tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation.").

In *United States v. Pelican*, 232 U.S. 442 (1913), also cited by the Reviser's Note to Section 1151, the Court had concluded that "Indian country" encompassed allotments made during the period of the General Allotment Act of 1887. Under that Act and similar statutes of this period, Congress sought to assimilate many tribes into non-Indian society by diminishing reservations and opening them up to settlement. *See Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650 n.1 (1976). The allotment system allowed individual Indians to receive allotments of land with the United States holding the land as trustee for a temporary period, upon the expiration of which the lands were conveyed in fee to the individual Indians. *See County of Yakima v. Confederated Tribes and Bands of the Yakima Nation*, 502 U.S. 251, 253-55 (1992).

The jurisdictional question in *Pelican* stemmed from this Court's decision in *Matter of Heff*, 197 U.S. 488, 502-03 (1905). In *Heff* this Court held that allotted lands were removed from the operation of federal statutes applicable to "Indian country." Congress disagreed, passing the Burke Act, 34 Stat. 182, which provided in part that "until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States." *See Pelican*, 232 U.S. at 451; *County of Yakima*, 502 U.S. at 255. *Pelican* reaffirmed that, so long as the trust period remained in effect, the allotted land was "Indian country":

> In the present case, the original reservation was Indian country simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the Government. *Donnelly v. United States, supra*. The same considerations, in substance, apply to the allotted lands which, when the reservation was diminished, were excepted from the portion restored to the public domain. The allottees were permitted to enjoy a more secure tenure and provision was made for their ultimate ownership without restrictions. But, meanwhile, the lands remained Indian lands set apart for Indians under governmental care; and we are unable to find ground for the conclusion that they became other than Indian country through the distribution into separate holdings, the Government retaining control.

232 U.S. at 449.

McGowan similarly applied the notion of Indian country to include lands held by the United States which constituted a *de facto* "reservation." *McGowan* involved a proceeding for the forfeiture of two automobiles on the ground that they had been used to introduce intoxicants into the Reno Colony, a 28 acre parcel of land that Congress purchased for the use of non-reservation Indians in Nevada; the Federal Government held title to the parcel. 302 U.S. at 536-37. Because the subject area was not within a reservation as such, the court of appeals affirmed a dismissal of the proceeding on the ground that the Reno Colony was not "Indian country." *Id.* at 536. This Court reversed, however, reasoning that the Indians there had been established "in homes under the supervision and guardianship of the United States," and held that Congress' decision to acquire land for, and to provide them a home in, a "colony" instead of a "reservation" was "immaterial." *Id.* at 538-39. Because the land for the Reno Colony had been purchased and "validly set apart for the use of the Indians," and because that land was under the title and superintendence of the federal government, it was "not reasonably possible to draw any distinction between this Indian 'colony' and 'Indian country.'" *Id.*

The third case cited by the revisers, *Sandoval*, is the source of the phrase "dependent Indian communities." In *Sandoval*, the Court considered Congress' power under the Constitution to denominate as "Indian country" for the purposes of a prohibition on introducing intoxicants into Indian country, the lands of the Pueblo Indians of New Mexico. Unlike the other Indian lands which the Court had considered, the Pueblo lands were not occupied and held by aboriginal title but had been the subject of land grants by a prior sovereign, the King of Spain. The Court noted that "[t]he lands belonging to the several pueblos vary in quantity, but usually embrace about 17,000 acres, held in communal, fee simple ownership under grants from the King of Spain made during the Spanish sovereignty and confirmed by Congress since the acquisition of that territory by the United States." 231 U.S. at 39. Nonetheless, the Court held that Congress' constitutional power respecting the Indian tribes extended to "all dependent Indian communities within [the United States'] borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State." 231 U.S. at 46. In view of the particular circumstances regarding the Pueblo, the Court concluded that Congress could elect to treat the Pueblo lands as part of "Indian country":

> As before indicated, by an uniform course of action beginning as early as 1854 and continued up to the present time, the legislative and executive branches of the Government have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection, like other Indian tribes . . . . [T]his assertion of guardianship over them cannot be said to be arbitrary but must be regarded as both authorized and controlling.

231 U.S. at 47; *see also United States v. Chavez*, 290 U.S. 357, 361-65 (1933); *United States v. Candelaria*, 271 U.S. 432 (1926) (discussing and following *Sandoval*).

This Court's jurisprudence thus establishes that "Indian country" consists of formally denominated Indian reservations and other areas which are their functional equivalent. Whether such areas are formally recognized as "reservations," or consist of land allotted from a former reservation and still held in trust by the United States for use by the Indians, *see Pelican*, land purchased by the United States and set aside for the use of a colony of Indians, *see McGowan*, or land granted by a prior sovereign for Indians, which has been explicitly recognized and confirmed by the United States, *see Sandoval*, there was in each case an explicit Congressional statement that the lands were to be used for a semi-autonomous Indian community subject to the Federal Government's continued "supervision and guardianship." *McGowan*, 302 U.S. at 538. The lands involved could thus be indisputably characterized as "validly set apart for the use of the Indians as such, under the superintendence of the [Federal] [G]overnment." *Id.* at 539 (quoting *Pelican*, 232 U.S. at 449) (emphasis in original deleted).[4]

That this Court has not recognized a "dependent Indian community" to exist in any circumstances other than those of the Pueblo in *Sandoval*, *Candelaria*, and *Chavez* demonstrates that only an extremely narrow category of Indian country can exist outside formally denominated reservations—and that limited category cannot include freely alienable land. Moreover, *Sandoval*, *Pelican*, and *McGowan* require that the federal set aside must be

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[4] Courts have applied the *McGowan-Pelican* standard for purposes of interpreting and applying Section 1151. *See, e.g., Indian Country, U.S.A., Inc. v. Oklahoma Tax Comm'n*, 829 F.2d 967, 974 (10th Cir. 1987), *cert. denied sub nom. Oklahoma Tax Comm'n v. Muskogee (Creek) Nation*, 487 U.S. 1218 (1988) (lands held in fee simple by the Creek Nation, subject to a treaty rendering them immune from state or territorial laws, satisfied *Pelican* test). Similarly, this Court has in some cases simply applied the *McGowan-Pelican* standard without reference to Section 1151. *See Potawatomi Tribe*, 498 U.S. at 511.

explicitly for the purpose of providing an area in which Indians can operate as a semi-autonomous community, subject to pervasive federal superintendence. Both elements must be strongly present so as to make it clear to the State, its citizens, and the business community, that Congress intended for a group of Indians to exercise the quasi-sovereignty traditionally associated with reservation status, subject to the ultimate control of the federal government.[5]

Here, while the Ninth Circuit acknowledged that this Court's teachings in *McGowan*, *Pelican*, and *Sandoval* instruct that "federal set aside and superintendence [are] prerequisites to the existence of a dependent Indian community," it further asserted the view—flatly contradicted by the Court's cases—"that these requirements should be construed broadly." Pet. App. 10a. It thus stretched the traditional understanding of a federal set aside far beyond anything ever recognized in this Court's cases and trivialized the concept of federal superintendence.

This Court should apply and re-emphasize the *McGowan-Pelican* rule in the plain terms originally adopted and long enforced by this Court. Adherence to this standard is

[5] In *Sandoval*, these elements were established by (1) the grant by the King of Spain of a communal, fee simple ownership that had been recognized and confirmed by explicit federal action, 231 U.S. at 39, (2) "agents and superintendents have been provided to guard their interests," *id.* at 40, and (3) Congress had expressly provided that neither the lands nor property of the Pueblo villages and individual Indians were to be subject to taxation by the Territory, and subsequently the State, of New Mexico. *Id.*

Pelican and *McGowan* are to similar effect. *Pelican* addressed when an allotment might be fully effective to terminate the federal set aside and federal superintendence. *McGowan* was concerned with a federal effort to provide a colony for needy Indians in Nevada who were not part of organized reservations, 302 U.S. at 537, and who could potentially benefit from living "in homes under the supervision and guardianship of the United States" on land held by the federal government for that purpose. *Id.* at 538.

necessary to protect against unintended encroachments on the States' historic police powers and to provide fair notice to those citizens who contemplate living in or engaging in business activity in set-aside areas. In contrast to the Ninth Circuit, other courts of appeals have recognized the implications for political sovereignty that are inherent in the federal set-aside and federal superintendence elements of *Sandoval*, *Pelican*, and *McGowan*. In *Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Co.*, 89 F.3d 908 (1st Cir. 1996), the First Circuit began its analysis of these issues by noting that it was in effect being asked to decide whether Indian sovereignty existed where state sovereignty would ordinarily apply. *See id.* at 915 (citing *Indian Country, U.S.A.*, 829 F.2d at 973). Thus, for "Indian country" to be recognized, the federal government's superintendence must be so pervasive as to manifest the displacement of the State's sovereignty. *See id.* at 920.

This Court should therefore clarify that the appropriate standard for identifying a "dependent Indian community" is the exacting standard reflected in *Sandoval* and set forth in *Pelican* and *McGowan*: whether Congress has expressly "set apart [an area] for the use of the Indians as such under the superintendence of the [Federal] Government." *McGowan*, 302 U.S. at 539 (quoting *Pelican*, 232 U.S. at 449). *See also Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) ("plain statement rule is . . . an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere").

II. THE ALASKA NATIVE CLAIMS SETTLEMENT ACT PRECLUDES RECOGNITION OF ANCSA LANDS AS "INDIAN COUNTRY"

Under the foregoing legal principles, ANCSA lands cannot comprise "Indian country." Congress manifestly did not "set aside" under "federal superintendence" the

land conveyed to the Venetie and other native groups under ANCSA to create an area similar to a reservation or allotment. On the contrary, ANCSA expressly revoked the few reserves that had been created in Alaska and abolished all claims of aboriginal title. Congress' settlement was to operate without establishing any of the incidents of superintendence or dependency, or conferring any sovereignty on Native groups:

> [T]he settlement should be accomplished rapidly, with certainty, . . . without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska.

43 U.S.C. § 1601(b). The Federal Government has never exercised a "superintendence" over the native inhabitants of Alaska similar to that which existed with respect to Indian tribes in the 48 contiguous States, and Congress confirmed Alaska's unique historical position in ANCSA.

A. Native Alaskans Have Been Subject To Federal, Territorial, And State Law, Not The Law Of A Tribal Sovereign

When the United States acquired the territory of Alaska from Russia in 1867, federal Indian policy was beginning a long shift towards assimilation. The Indian tribes were increasingly treated not as separate nations but as subject to the overlapping federal and state jurisdiction. "By 1880, the Court no longer viewed reservations as distinct nations. On the contrary, it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law." *Organized Village of Kake v. Egan*, 369 U.S.

60, 72 (1962) (citation omitted). Thus, in 1871 Congress entirely abolished the power to make treaties with the Indian tribes. *Id.* (citation omitted). Further, in 1887 the General Allotment Act was passed, "authorizing the division of reservation land among individual Indians with a view toward their eventual assimilation into our society." *Id.*

These historical trends in Indian policy, especially given the sparse and extremely remote population of the Alaska territory, were reflected in the earliest provisions for the government of the territory and its native peoples. Russia had established no trusteeship or fiduciary arrangement with the native peoples of Alaska. *See* Memorandum from Solicitor, U.S. Department of the Interior to Secretary, U.S. Department of the Interior, No. M-36975 (January 11, 1993) at 13-14 (hereafter "1993 Interior Memorandum"). When this nation entered into the Treaty of Cession with Russia, the United States recognized no special claims by aboriginal peoples to the lands being ceded by Russia.[6] No treaties were entered into with any of the native tribes inhabiting the area in the short period of time before the treaty-making power was abolished. Nor did the federal government undertake any special responsibilities or functions with respect to natives in the

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[6] The Treaty of Cession with Russia provided in part:

> The cession of territory and dominion herein made is hereby declared to be free and unencumbered by any reservations, privileges, franchises, grants or possessions, by any associated companies, whether corporate or incorporate, Russian, or any other, or by any parties, except merely private individual property holders; and the cession hereby conveys all the rights and franchises, and privileges now belonging to Russia in said territory or dominion and appurtenances thereto.

15 Stat. 539, 543 (1867), quoted in 1993 Interior Memorandum at 15. *Cf. Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

territory.[7] Indeed, the territory had no formal government at all until 1884, when Congress passed the first Organic Act to provide for a territorial government. *See* 1993 Interior Memorandum at 15.

Early judicial precedents likewise confirmed that Alaska and all its peoples were under direct federal and subsequently territorial governance, without special provision for any distinct native sovereignty as had existed in the contiguous States and territories. Thus, prior to the creation of a territorial government, in contrast to the doctrine of *Ex Parte Crow Dog, supra,* Indian matters were treated under generally applicable federal laws, rather than laws of special application to "Indian country." For example, *United States v. Williams*, 2 F. 61 (D. Or. 1880), in dismissing a count for assault in Indian country, held that in light of Congress' specific action to designate Alaska as "Indian country" for purposes of the liquor control provisions of the Trade and Intercourse Act of 1834,[8] Alaska would not be considered as "Indian country" for purposes of the criminal statutes applicable to offenses within "Indian country." The court instead relied on a general federal statute applicable to attempted murder "within any place or district of country under the exclusive jurisdiction of the United States . . . and out of the jurisdiction of any particular state," reasoning

[7] Article III of the Treaty of Cession provided that the inhabitants of Alaska could return to Russia within three years but, if they chose to remain, would "be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States." 15 Stat. 539, 542, quoted in 1993 Interior Memorandum at 15.

[8] In an early case, *United States v. Seveloff*, 27 F. Cas. 1021 (D. Or. 1872), a prosecution for sale of liquor to Alaska natives was dismissed on the ground that the "Indian country" reached by the 1834 Trade and Intercourse Act was confined to areas east of the Rocky Mountains. Congress reacted by amending the statute to bring Alaska within "Indian country" for purposes of the statute's liquor control provisions. *See* 1993 Interior Memorandum at 17-18.

that "[w]ithout doubt Sitka, in Alaska, is a place under the exclusive jurisdiction of the United States." 2 F. at 62.

Similar results were reached after Congress formed a territorial government for Alaska. *Crow Dog* was specifically distinguished with respect to the Alaska territory in *Kie v. United States*, 27 F. 351 (D. Or. 1886), a case which recognized federal jurisdiction over a prosecution for the murder of one native Alaskan by another. Recognizing that *Crow Dog* prevented the courts of the United States from taking jurisdiction over crimes by Indians against Indians in "Indian country," the court concluded that "Alaska is not 'Indian country,' in the conventional sense in which that phrase is used in the act of 1834 and the Revised Statutes." *Id.* at 355. Judge Deady reasoned that the condition of the native Alaskans was distinct from that of native tribes encountered earlier in history, and that Congress intended that native people in Alaska be subject to the same laws as the rest of the territorial population:

> Nor is it at all probable that the aborigines of Alaska can or will be considered as dependent or domestic nations, or people having any title to the soil of the country, to be extinguished by the United States, as were the Indian tribes north and west of the Ohio river. The country was purchased from Russia in 1867.
>
> . . . .
>
> At the date of this cession Russia owned this country as completely as it now does the opposite Asiatic shore; and the right of the inhabitants in and to the use of the soil was such, and only such, as it saw proper to acknowledge or concede to them. The United States took the country on the same footing, agreeing to respect the private property of individuals, and to make such regulations concerning the uncivilized natives, including, of course, their occupation of the soil, as it might deem best. Accordingly, [*C*]*ongress, by the passage of the Alaska act*

> *of 1884, has provided a government for the country without any reservation or qualification as to the persons or classes of the inhabitants over and upon whom it shall have jurisdiction and authority.*

Id. at 354 (emphasis added).[9]

On the basis of these early decisions, it was concluded immediately prior to Alaska statehood that there was little, if any, "Indian country" in Alaska under 18 U.S.C. § 1151. *United States v. Booth,* 161 F. Supp. 269 (D. Alaska 1958). In *Booth,* the court held that Alaska's territorial jurisdiction would extend to the prosecution of crimes committed within the Metlakatla reserve,[10] on the grounds that such lands were not "Indian country." Judge Kelly reasoned that the Metlakatla reserve was not a "reservation" as that term had to be understood in historical context for the purposes of Section 1151(a), nor were the Metlakatlans a "dependent Indian community." 161 F. Supp. at 273. The district court noted

[9] To the same effect is *In re Sah Quah,* 31 F. 327 (D. Alaska 1886). In *Sah Quah,* the Tlingit holder of a putative slave, who was also a native Alaskan, claimed exemption from the Thirteenth Amendment under the doctrine of *Crow Dog.* The Court ordered that the petitioner be freed, holding that

> [t]he United States has at no time recognized any tribal independence or relations among these Indians, has never treated with them in any capacity, but from every act of [C]ongress in relation to the people of this territory it is clearly inferable that they have been and now are regarded as dependent subjects, amenable to the penal laws of the United States, and subject to the jurisdiction of its courts.

31 F. at 329; *see Metlakatla Indian Community v. Egan,* 369 U.S. 45, 50-51 (1962).

The prosecution in *Kie* and the civil action brought in *Sah Quah* straddled Congress' partial abrogation of the *Crow Dog* doctrine in 1885, when federal criminal law over specified crimes by Indians against Indians was extended to "Indian country." *See Organized Village of Kake,* 369 U.S. at 72.

[10] The historical circumstances of the Metlakatla reserve are described in *Metlakatla Indian Community,* 369 U.S. at 48-55.

that the bases for demarcating a separate "Indian country" did not apply to Alaska:

> [W]hen a territorial government was formed, the reasoning of the *Sah Quah* case suggested that all of the Indian inhabitants came within the jurisdiction of the territorial laws. . . . [I]t was the policy of the United States Government to allow Indian tribal organizations to maintain their traditional forms of self-government, and to recognize the tribes as dependent sovereignties. Southeastern Alaska has never known tribal organization since the purchase of Alaska from Russia.

Id. See also Metlakatla Indian Community, 369 U.S. at 51-52. *But see In re McCord,* 151 F. Supp. 132 (D. Alaska 1957).

B. ANCSA Revokes Any Prior "Set Aside" Of Land For Use By Alaska Natives And Disavows Any "Federal Superintendence" Over Such Land

The absence of "federal superintendence" of a distinct "Indian country" in Alaska was confirmed by Congress with the passage in 1971—only 13 years after Alaska became a State—of the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. §§ 1601-1629e. The genesis of ANCSA was the existence, both before and after Alaska joined the Union, of unresolved claims of ownership of lands in Alaska by native Alaskan groups based on various theories of aboriginal title.

This Court had held in *Tee-Hit-Ton* that mere aboriginal "title," *i.e.,* occupancy prior to Alaska's acquisition by the United States not otherwise confirmed as title by Congress, could not give rise to a takings claim under the Fifth Amendment. 348 U.S. at 288-89 ("Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation."). The Court further held that neither the Organic Act for Alaska of

1884 nor a 1900 Act providing a civil government for Alaska had confirmed any aboriginal title claims. *Id.* at 278. However, *Tee-Hit-Ton* left uncertain the degree to which some aboriginal titles might have been confirmed by or under the authority of other acts of Congress. *See* 1993 Interior Memorandum at 68-69. Moreover, the Statehood Act for Alaska, 72 Stat. 339, neither confirmed nor denied the validity of such claims. *Organized Village of Kake*, 369 U.S. at 67.

Congress sought to resolve this situation with passage of ANCSA in 1971. The principal feature of ANCSA was the distribution of some 40 million acres of land and close to one billion dollars in cash to native Alaskan groups in return for the extinguishment of all aboriginal land titles and the revocation of all existing reservations, excepting only the Annette Island Reserve of the Metlakatla.[11] The land was conveyed by means of a patent in fee simple without restrictions on alienation. Along with cash payments the land was conveyed to corporate entities organized to represent Native Alaskans and to effect distribution of interests in the settlement through share ownership. *See* 43 U.S.C. § 1613.

Congress was unequivocal in specifying the effect of the settlement:

> Notwithstanding any other provision of law, and except where inconsistent with the provisions of this chapter, the various reserves set aside by legislation or by Executive or Secretarial Order for Native use

[11] The catalyst for ANCSA was the need to clear title to the land on which the Trans-Alaska oil pipeline would be built. By 1968, Alaska Natives had laid claim to some 337 million acres of land in Alaska, roughly 90% of the land in the State. Douglas M. Branson, *Square Pegs In Round Holes: Alaska Native Claims Settlement Corporations Under Corporate Law*, 8 UCLA-Alaska Law Rev. 103, 104 (1979). "Some of the more colorable Native claims lay directly in the path" of the proposed 789 mile-long trans-Alaska pipeline. *Id.*

> or for administration of Native affairs . . . are hereby revoked subject to any valid existing rights of non-Natives.

43 U.S.C. § 1618(a). The extinguishment of aboriginal title was similarly explicit:

> All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.
>
> All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

43 U.S.C. § 1603(b) and (c).

In addition to these express provisions, Congress carefully disclaimed any intent to establish or continue a "reservation-style" relationship between the Federal Government and the newly created corporations. Thus, Congress declared that the settlement with Alaska Natives should be accomplished "without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska." 43 U.S.C. § 1601(b). The same intent is unambiguously reflected in the legislative history of ANCSA.[12]

[12] The Senate report, S. Rep. No. 405, 92d Cong. (1971) (accompanying S. 35) stated, "A major purpose of this committee and the Congress is to avoid perpetuating in Alaska the reservation and

Given these provisions, the Ninth Circuit's conclusion that the land conveyed in fee simple under ANCSA was validly set apart for the use of the Indians as such, under the superintendence of the [Federal] Government, *see* Pet. App. 10a, is patently wrong. The land settlement effected under ANCSA cannot legitimately be compared to an allotment of land held in trust by the United States (*Pelican*), much less to a colony (*McGowan*), or to a dependent communal ownership with restrictions on alienation that had been confirmed by the United States in connection with the exercise of an explicit federal protection and superintendence (*Sandoval*). On the contrary, ANCSA enacts precisely the sort of "ultimate ownership without restrictions" which *Pelican* deemed sufficient to terminate "Indian country" status. 232 U.S. at 449. While ANCSA provided for a conveyance of the prior Venetie reserved lands to the pertinent Village Corporation, *see* 43 U.S.C. § 1618(b), Congress revoked the Venetie reserve itself. And it did so while expressly disclaiming any federal "guardianship." The necessary result of such action is that the land conveyed under ANCSA is not "Indian country" but rather is subject to the general civil jurisdiction of the State of Alaska.

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trustee system which has characterized the relationship of the Federal Government to the Indian people in the contiguous 48 states." *Id.* at 61, quoted in *Cape Fox Corp. v. United States*, 4 Cl. Ct. 223, 234 n.25 (1983).

"The House rejected H.R. 7039, which in section 12(b)(1) provided patent[s] would be issued promptly on completion of a survey of selected lands and that the Secretary would hold the lands and interests in lands to which a village may be entitled 'in trust' until the village [would] qualif[y] to own real property." *Cape Fox Corp.*, 4 Cl. Ct. at 234 n.25. The Conference Report, H.R. Conf. Rep. No. 746, 92d Cong., 1st Sess. 37, *reprinted in* [1971] U.S. Code Cong. & Admin. News 2192, 2247, 2250, "indicates that Congress 'adopted a policy of self-determination on the part of the Alaska Native people,' and states that the 'lands granted by this Act are not "in trust" and the Native villages are not Indian "reservations."' " *Cape Fox Corp.*, 4 Cl. Ct. at 234 n.25 (quoting *id.*).

C. Any "Indian Country" That Might Have Been Created In Alaska Is Now Under State Jurisdiction

The Ninth Circuit further erred in holding that ANCSA was required to "terminat[e] the federal trust relationship . . . clearly and explicitly" in order to remove "Indian country" status. Pet. App. 21a. There cannot be "federal superintendence" of the use of land set aside for the Indians when the "set aside" itself has been revoked. Even assuming that the land involved was included in "Indian country" prior to ANCSA, Congress' revocation of reserves, conveyance of the prior reserved land in fee simple, extinguishment of other aboriginal title, and express disclaimer of any trusteeship is sufficient to eliminate any possibility that the land is Indian country and to insure that the land is subject to state jurisdiction.[13] *See DeCoteau v. District County Court*, 420 U.S. 425 (1975).

In *DeCoteau*, this Court determined that the 1891 Act terminating the Lake Traverse Reservation and pur-

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[13] In 1971 Congress would have had no reason to express any particular intent respecting a transfer of "Indian country" to state jurisdiction. Thirteen years earlier, Congress had already provided that "[a]ll Indian country within the State" of Alaska would be subject to Alaska's

> jurisdiction over civil causes of action between Indians or to which Indians are parties which arises in areas of Indian country . . . to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State.

28 U.S.C. § 1360(a).

Five years after ANCSA was enacted, this Court sharply limited the apparent transfer of general civil jurisdiction set forth in Section 1360. *See Bryan v. Itasca County*, 426 U.S. 373 (1976). But at the time ANCSA was passed, Congress would have expected that the State of Alaska *already* had "full civil and criminal jurisdiction over Indian reservations." *Organized Village of Kake*, 369 U.S. at 74; *see also Williams v. Lee*, 358 U.S. 217, 221 n.6 (1959).

chasing the subject land from the Sisseton and Wahpeton tribes had restored this land to the general jurisdiction of the State of South Dakota. The circumstances of *DeCoteau* are instructive here. Although the Act of Congress involved there reflected a different point in our nation's history, its basic terms were similar: like ANCSA, the "1891 Act . . . appropriate[d] and vest[ed] in the tribe a sum certain—$2.50 per acre—in payment for the express cession and relinquishment of 'all' of the tribe's 'claim, right, title and interest' in the unallotted lands." 420 U.S. at 448. Congress' intent in ANCSA was even more unmistakable: it revoked all reserved designations and all aboriginal titles in return for the payment of a mixed settlement in land and cash. Under *DeCoteau*, any prior reserved land, including that of the Venetie, should now be recognized to fall within the jurisdiction of the State of Alaska.

Notably, the Court in *DeCoteau* did not contemplate the end run around the statute that the Ninth Circuit effected here: *i.e.*, that even if a reservation is terminated it may yet remain "Indian country" because it is the residence of a "dependent Indian community." The Court instead recognized a straightforward rule that where a reservation has been unambiguously terminated it is no longer "Indian country":

> If the lands in question are within a continuing "reservation," jurisdiction is in the tribe and the Federal Government "notwithstanding the issuance of any patent, [such jurisdiction] including rights-of-way running through the reservation." 18 U.S.C. § 1151(a). On the other hand, *if the lands are not within a continuing reservation, jurisdiction is in the State*, except for those land parcels which are "Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. § 1151(c).

420 U.S. at 427 n.2 (emphasis added). Importantly, the ongoing federal participation in the affairs of the Sisseton-Wahpeton was at least as extensive in *DeCoteau* as the

Ninth Circuit found with respect to the Venetie here. *See* 420 U.S. at 442-43 ("Federal Indian agents have remained active in the area, and Congress has regularly appropriated funds for the tribes' welfare"). Nonetheless, the Court did not deem their lands to constitute a "dependent Indian community" but recognized that termination of their reservation had left them within the jurisdiction of the State. The same result should apply here.

* * *

After a comprehensive review of the history of the treatment of Alaska by Congress, the courts, and the executive branch, the Solicitor of the Department of the Interior concluded in 1993 that

> ANCSA reflected a new approach in defining the relationship between Alaska Natives and the federal government. ANCSA largely controls the determination whether any territory exists over which Alaska Native villages might exercise governmental powers. Congress has left virtually no room under ANCSA for Native villages in Alaska to exercise governmental power over lands and nonmembers.

1993 Interior Memorandum at 132; *see also id.* at 113-124 (noting at p. 113 that "ANCSA leaves little if any room for finding the existence of a dependent Indian community for purposes of classifying lands as Indian country"). The Ninth Circuit avoided reaching the same conclusion only by improperly holding that this Court's precedents respecting the scope of "Indian country" should be "construed broadly," Pet. App. 10a, and adopting a standard for the recognition of "dependent Indian communities" which is dramatically at odds with the governing precedents of this Court and which upsets the settled expectations of Alaska's citizens and state and local governments. The Ninth Circuit would frustrate the core elements of Congress' legislative settlement under ANCSA. Congress has expressly determined to revoke all Indian reserves within the State of Alaska, with one exception not

pertinent here,[14] and, as a necessary result, to permit the State to govern the related territory unhindered by claims of a competing federal or tribal interest based on a federal guardianship or trusteeship of Native Alaskans or their lands. There is no Indian country in Alaska.[15]

CONCLUSION

The judgment of the court of appeals should be reversed.

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August 21, 1997

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[14] By explicit statutory terms, Congress preserved the Annette Island Reserve inhabited by the Metlakatlan Indian Community. 43 U.S.C. § 1618(a).

[15] While a relatively small number of allotments were granted in Alaska under allotment authority existing prior to ANCSA, the allotted lands should not be regarded as "Indian country" under 18 U.S.C. § 1151(c). First, there is no basis for regarding allotments held by *individual* native persons as the domain of a sovereign Indian *tribe* such that it ought to be included within "Indian country" for purposes of this Court's jurisprudence respecting tribal sovereignty. *See* 1993 Interior Memorandum at 124. Moreover, for the same reason that the Court has refused to recognize a "checkerboard" of state and Indian sovereignty with respect to fee simple and trust lands located within reservations, *see Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 479 (1976), those isolated allotments existing within areas of general state jurisdiction should not be treated as "Indian country."

(12)

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In The

Supreme Court of the United States

October Term, 1997

STATE OF ALASKA,

Petitioners,

vs.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* TANANA CHIEFS CONFERENCE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Tanana Chiefs Conference, Inc. ("TCC") is an inter-tribal organization comprised of 43 federally recognized Alaska Native tribes, including Respondents, the Gwich'in Athabascan villages of Arctic Village and Venetie. TCC's member tribes are composed of 14,000 Athabascan Indians, or about 14% of the Alaska Native population. The Alaska Native Claims Settlement Act ("ANCSA") designated TCC as one of the entities authorized to implement ANCSA. 43 U.S.C. § 1606(a)(5) and (d).

Arctic Village and Venetie, together with TCC's other member tribes, are named in ANCSA as "Native Villages subject to this Act." 42 U.S.C. § 1610(b)(1). Most of TCC's member tribes have authorized TCC to provide federal governmental services to them and their tribal members amounting to over $50 million annually. Pursuant to the Tribal Self-Governance Act of 1994, the Secretary of the Interior and the Secretary of Health and Human Services have entered into self-governance compacts with TCC member tribes, through TCC, transferring to TCC responsibility for providing the full range of Bureau of Indian Affairs and Indian Health Service programs, services and functions. These functions include medical, dental, vision, mental health, education, employment, trust property management, tribal government operations, tribal court assistance, and Indian child welfare protection. These compacts acknowledge the self-governance rights of TCC member tribes, and especially provide that the trust relationship between the federal government and the TCC member tribes

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members or its counsel made a monetary contribution to the preparation and submission of this brief.

shall not be deemed to be diminished because of tribal self-administration of federal programs and services. These compacts confirm the federal government's longstanding view that giving Alaska Natives increasing autonomy does *not* diminish the federal government's trust responsibilities.

Alaska's contention that ANCSA terminated the dependent Indian community governed by the Native Village of Venetie Tribal Government is premised upon reasoning that applies to all Alaska Native tribes. If Alaska's argument is accepted, the long-recognized self-governing powers and rights of these tribes could be severely curtailed. TCC and its member tribes have a fundamental interest in protecting these sovereign powers and the right to exercise them under the same principles of federal Indian law that apply to tribes in every other State. Moreover, TCC villages should be able to rely upon the federal government's promises, contained in the compacts, that tribal self-determination - whether in the form of ANCSA or through the operation of federal Indian programs - shall not result in diminishment of federal trust obligations, nor be a basis to deny Alaska Natives the power to govern themselves in the same manner as other American Indian tribes.

SUMMARY OF ARGUMENT

Petitioner agrees that if Alaska Natives occupy or use "Indian country," they have certain political rights regarding the governance of that country they would not otherwise have, *including* the right to impose the tax at issue in this litigation. Specifically, Petitioner agrees that "within [Indian country] tribes have broad authority -- subject to federal limitations -- to govern not only their own members, but also land and non-members." Pet. Br. at 18 & n.9; Pet. at 2 (noting that this authority includes the power to tax and to regulate).

Accordingly, the central question presented here is whether Respondents do or do not occupy "Indian country."

In 1948, Congress specified that "Indian country" "means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States . . . (b) all dependent Indian communities within the borders of the United States . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished." 18 U.S.C. § 1151. Because this case does not involve an "Indian reservation" within the meaning of clause (a), or an "Indian allotment" within the meaning of clause (c), the question is whether Respondents are "dependent Indian communities" within the meaning of clause (b). If they are, as the Court of Appeals ruled, the land they occupy is "Indian country," and the judgment below should be affirmed.

The district court concluded that until enactment of ANCSA in 1971, Respondents were "dependent Indian communities" and the land they occupied was therefore "Indian country."[2] The district court ruled, however, that ANCSA "extinguished Indian country in Alaska." Pet. App. 2a.

The Court of Appeals agreed that before enactment of ANCSA respondents were dependent Indian communities, but it found no basis in the text, legislative history, or purpose of ANCSA to believe that in enacting ANCSA Congress intended to extinguish Indian country or the rights of dependent Indian communities, or to abandon the federal government's historical trust relationship and responsibilities towards dependent Indian

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[2] "Until 1971, there is little doubt but what the Neets'aii Gwich'in were treated by Congress and the Executive agencies as being subject to active superintendence to such a degree as to amount to a dependent Indian community for purposes of 18 U.S.C. § 1151(b)." Pet. App. 67a.

communities.

Our basic point is that the courts should not impute to Congress an intent to abandon its trust responsibilities to dependent Indian communities unless that intent is expressed in clear and unambiguous terms. Because that point is supported by fundamental principles of equity and nearly two centuries of precedents, Petitioner is forced to argue that "*the clear intent* of Congress in enacting ANCSA" was to preclude the treatment of lands conveyed to Alaska Natives under the Act as Indian country. Pet. Br. at 27 (emphasis added). But that is plainly not so. Even the district court acknowledged that "the Indian Country issue was *not expressly resolved by ANCSA*." Pet. App. 72a (emphasis added). Indeed, as the district court noted, "ANCSA does not once mention the term 'Indian country,'" because, in its view, "Congress deliberately, and no doubt for political reasons, left unresolved the Indian Country question which the court now decides." Pet. App. 71a.

Moreover, there is no basis in the text, purpose or legislative history of ANCSA even to infer a congressional purpose to extinguish any rights of dependent Indian communities *other than* their aboriginal land claims. The purpose of the Alaska Native Claims Settlement Act, as the name of the Act itself suggests, was to provide for "a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims." 43 U.S.C. § 1601 (a). It was *not* the purpose of that Act to diminish any rights of Alaska Natives other than aboriginal land claims, and it was *not* the purpose of that Act to terminate or diminish the trust responsibilities or obligations of the United States to Alaska Natives. The Congressional declaration of policy makes that explicitly clear: "no provision of this chapter shall replace or diminish any right, privilege, or obligations of Natives as

citizens of the United States or of Alaska, or relieve, replace or diminish any obligations of the United States or of the State [of] Alaska to protect and promote the rights or welfare of Natives as citizens of the United States or of Alaska." 43 U.S.C. § 1601(c).

Accordingly, Petitioner is forced to argue that, as a matter of law, an Indian community cannot be "dependent" on the United States within the meaning of one statute (18 U.S.C. § 1151), if the United States has granted that community fee simple title to the land it occupies under another statute (43 U.S.C. § 1601 *et seq.*). But there is no inherent or irreconcilable conflict between land ownership and dependency. Minors can own title to land, but still be dependent on their parents. And Indian communities can own title to land and still be dependent on the federal government. Land ownership is only one of the many factors that make up the complex relationship between Indian communities and the United States government.

Finally, "Indian country," as defined by 18 U.S.C. § 1151(b), includes "*all* dependent Indian communities within the borders of the United States." *Id.* (emphasis added). This definition is all-encompassing and, by its terms, does not exclude Indian communities that own title to the lands they use and occupy. To the contrary, the statutory definition explicitly incorporates 18 U.S.C. § 1154, which makes clear that "[t]he term 'Indian Country'" *does* include "fee-patented lands" so long as those lands are within "Indian communities."

The Court of Appeals was thus correct in concluding that ANCSA preserved Indian country and the rights of dependent Indian communities such as Respondents. The decision below should be affirmed.

ARGUMENT

I. ALASKA NATIVE VILLAGES ARE "DEPENDENT INDIAN COMMUNITIES," AND THE COUNTRY THEY OCCUPY IS THEREFORE "INDIAN COUNTRY."

A. To Determine Whether Alaska Native Villages Are "Dependent Indian Communities," the Court Should Look to the Well-Established Meaning of That Term, and Not Ask, as Alaska Argues, Whether These Villages Are Like Reservations.

In 18 U.S.C. § 1151, Congress established an expansive definition of the term "Indian country." On its face, the statute creates three different categories of Indian country - "reservations," "dependent Indian communities," and "allotments." Petitioner in this case attempts to equate "reservations" and "dependent Indian communities," but provides no explanation as to why this Court should read the words "dependent Indian communities" out of the statute.[3] As section 1151 itself and the history of the terms used therein

[3]Alaska's argument fails to acknowledge that the federal government generally retains its trust relationship with an Indian tribe even after Congress has explicitly "terminated" its reservation. *See DeCoteau v. District County Court*, 420 U.S. 425, 442-43 (1975) (describing the ongoing trust relationship between the federal government and the Sisseton-Wahpeton Sioux Tribe after the termination of the Tribe's reservation). Moreover, a "dependent Indian community" may exist on former reservation lands. *See United States v. South Dakota*, 665 F.2d 837 (8th Cir. 1981), *cert. den.*, 459 U.S. 823 (1982) (emphasizing the ongoing superintendence by the federal government of the Sisseton-Wahpeton Sioux Tribe).

demonstrate, those terms are distinctly different.

In enacting section 1151, Congress expressly adopted language from this Court's opinion in *United States v. Sandoval*, 231 U.S. 28, 46 (1913). In *Sandoval*, the Court found that "[t]he people of the pueblos" were a "dependent Indian community" and thus occupied Indian country. 231 U.S. at 39. In coming to this conclusion, the Court focused on the "race, customs, and domestic government" of the community. Finding that the people of the pueblos were Indian in all of these respects and that they had "[a]lways liv[ed] in separate and isolated communities," the Court then considered whether they had been "treated . . . [with] special consideration and protection, like other Indian communities[,]" by the federal government.[4] *Id.* Because the people of the pueblos had been "recognized" as a tribe by the "political departments of the government," and thus had a trust relationship with the federal government, the Court found that they were "dependent." *Id.* at 47.

As *Sandoval* and subsequent cases demonstrate, the test to determine if a given community is a "dependent Indian community" does *not* turn on whether the community occupies land that is "like a reservation." Whether particular land is a reservation depends on whether the *land* was set aside for Indian use and occupancy. In contrast, the term "dependent

[4] *Sandoval* notes that this "protection" is demonstrated by federal appropriations for the education and economic development of the pueblo communities. *Id.* at 39-40. As the court below describes, Pet. App. at 27a, Alaska Native villages, both before and since ANCSA, have received and continue to receive substantial federal appropriations for Indian programs available to tribes throughout the United States. *See* 43 U.S.C. §§ 1601(g) and 1626(d).

Indian community" focuses on the nature of the *community* that uses or occupies the land in question. Thus, to determine whether Alaska Native villages are Indian country, the Court must simply determine whether these villages are "Indian communities" and whether they are "dependent." If so, the land the community uses or occupies is Indian country.[5] Under the well-established meaning of these terms, Alaska Native villages, including Arctic Village and Venetie, are clearly dependent Indian communities.

B. Alaska Native Villages Are Plainly "Indian Communities" and Have Been Federally Acknowledged and Recognized To Be Distinct Indian Communities.

There is no doubt that Alaska Native villages are Indian communities; Petitioner does not appear to dispute that fact. These communities are of distinctly Indian character. For example, according to the 1990 Census, the population of Arctic Village was 100% Alaska Native, and of Venetie was 99.4%. In Arctic Village 61.2% of the population spoke a language other than English; in Venetie, the percentage was

[5]It is sufficient that a "dependent Indian community" use or occupy land *as a community* in order for that land to be Indian country. In this case, the land in question is Respondents' former reservation territory, which they have used and occupied since time immemorial. Thus, the extreme extensions of Indian country suggested by Petitioner and its *amici* are completely unfounded. If, for example, a dependent Indian community were to purchase land for a purely commercial venture, rather than use and occupy it as a community, that land would not be Indian country. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 153 (1973).

80.3.[6]

Formal "Federal recognition" has been extended to 226 Alaska Native villages including, specifically, Arctic Village and Venetie. 58 Fed. Reg. 54364, 54368-69 (October 21, 1993).[7] In doing so, the Department of the Interior "expressly and unequivocally" affirmed that these villages "are *distinctly Native communities* and have the same status as tribes in the contiguous 48 states . . . . [including] the right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities available to other tribes." *Id.* at 54365-66 (emphasis added).

C. Alaska Native Villages Are "Dependent" Indian Communities.

The adjective "dependent" describes an Indian community that is under federal superintendence. Under its plenary authority over Indian affairs, Congress has long assumed a trustee relationship with Indian tribes. This superintendence relationship exists until such time as the federal government

[6] Although the Census does not identify this language, the evidence before the district court below identifies it as Gwich'in. *See* Pl. Ex. 171, p. 18. That Census also shows that of the 226 Alaska Native villages, nearly two-thirds were over 80% Alaska Native. 1990 Census of Population, General Population Characteristics: Alaska, 1990 CP-1-3, Table 14 (U.S. Dept. of Commerce 1992).

[7] This 1993 Federal Register Notice of federally recognized tribes was only the latest formal recognition of Alaska Native villages as tribes. The Notice, after reviewing the history of federal recognition of Alaska Native villages, concludes that those villages have consistently been subject to the same legal principles as Indians in other states. 58 Fed. Reg. at 54365. *See also* Cohen, Federal Indian Law 934-38 (1958 DOI ed.).

terminates the relationship. Thus, this Court has always emphasized that a "dependent Indian community" is one which is under the "supervision and guardianship" of the federal government. *See e.g., United States v. McGowan*, 302 U.S. 535, 538 (1938); *United States v. Creek Nation*, 295 U.S. 103, 109-110 (1935) ("The tribe was a dependent Indian community under the guardianship of the United States"); *United States v. Chavez*, 290 U.S. 357, 361 (1933) ("The people of these pueblos . . . . have [been] regarded . . . as dependent Indian communities requiring and entitled to its aid").

Contrary to petitioner's claim, federal superintendence -- and hence a "dependent" relationship -- does not mean that the federal government "assumes jurisdiction and control over virtually all facets of the community to supervise, protect, and, indeed sustain the Indians residing there." Pet. Br. at 40. Federal Indian policy and law have always been clear that so long as Indian communities can depend on the federal government for protection and assistance, they are "dependent" Indian communities, even if the federal government permits them to have substantial autonomy and independence. Indeed, increasing tribal autonomy and independence is an essential component of the federal government's trust responsibility.

The federal government has long recognized Alaska Native tribes, including Arctic Village and Venetie, and thus has established this trust relationship. Whether or not these tribes are "dependent" turns on whether the federal government has terminated its longstanding trust relationship. It has not.[8]

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[8] The very fact of "recognition" by the federal government signifies the establishment (or continuation) of the trust relationship. Indeed, the acknowledgment of the tribe means that the tribe is entitled "to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes." 25 C.F.R. § 83.2.

1. Tribal Self-Determination Is Consistent With the Existence of An Ongoing Trust Relationship.

From its earliest cases, this Court has described Indian tribes as "distinct, independent political communities," *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832), and recognized that Indian tribes "possess[] attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). Indian tribes, while dependent on and subject to, the powers of the federal government, nonetheless retain a substantial measure of independence.[9] That fact of independence does not conflict with the ongoing trust relationship because the right of self-government is wholly dependent on the broad powers of Congress. Until Congress severs its trust relationship with an Indian tribe as a political entity, that relationship continues to exist. *See White Mountain Apache Tribe*, 448 U.S. at 143

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[9] Alaska's argument that a tribe is only "dependent" if it lacks any aspect of independence or self-governance conflicts with "notions of sovereignty that have developed from historical traditions of tribal independence," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980), and ignores this Court's clear articulation of the meaning of the term "dependent" as applied to the federal government's relationship with tribes. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 159 (1982); *United States v. Wheeler*, 435 U.S. 313, 326 (1978) *(quoting Worcester v. Georgia*, 31 U.S. at 560-561 ("'[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence - its right of self-government, by associating with a stronger, and taking its protection'"); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 207 (1978) ("The Indian nations were, from their situation, necessarily dependent on [the United States]. . . for their protection from lawless and injurious intrusions into their country") (internal quotations omitted).

("The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress"); *Oliphant*, 435 U.S. at 211 (tribes are "dependent" when their sovereignty continues to be "fully subordinated to the sovereignty of the United States"); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980) ("Tribal powers are not implicitly divested by virtue of the Tribes' dependent status"); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

2. *ANCSA Corporate Land Ownership Is Completely Consistent With An Ongoing Trust Relationship.*

Petitioner's argument about ANCSA's conveyance of settlement lands to corporations is difficult to understand. Petitioner seems to argue that, if an Indian community owns the land it occupies, it cannot be dependent. Pet. Br. at 22, 23 & 38 n.28. However, petitioner also appears to argue the opposite: that, if an Indian community does *not* own the land, it cannot be dependent even though the land is owned by a corporation created by the federal government to hold the land for the community's benefit. Pet. Br. at 34 & 38 n.28. Both of these arguments are wrong.

Petitioner's first argument is foreclosed by *Sandoval*. In *Sandoval*, this Court found that the "people of the pueblos," who owned their land, were a "dependent Indian community." Here, the Venetie tribe, through the village corporation created under ANCSA to hold land on its behalf, owns the land that is used and occupied by its villages. Accordingly, unless this Court overrules *Sandoval*, Petitioner's argument must fail.

Petitioner's second argument is similarly foreclosed by this

Court's precedents and the text of section 1151 itself. As noted above, section 1151's definition of Indian country was derived directly from this Court's opinions in *Sandoval* and *McGowan*. Under *Sandoval*, it is settled law that direct ownership by an Indian community of land it uses and occupies is consistent with an ongoing trust relationship with the federal government and the statutory requirements for "Indian country."[10] Under *McGowan*, it is similarly settled that a dependent Indian community can exist on land the community does not own, but which is held in trust for the benefit of the community by the United States government. 302 U.S. at 539. Accordingly, there is no basis in the text, legislative history, or precedent to claim, as Petitioner does now, that land cannot be Indian country if it is owned for the benefit of a particular tribe by a federally created corporation.

Petitioner's two contradictory arguments are flawed because each is based on the fundamental misconception that pervades Petitioner's brief. Both arguments are based on the mistaken view that a dependent Indian community can *only* exist where a tribe uses or occupies land the federal government owns. This Court, however, has long embraced a quite different test for determining whether an Indian community is a "dependent" community, under which federal land ownership has never been dispositive.[11] Rather, the test

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[10]The text of section 1151 expressly incorporates 18 U.S.C. § 1154. Section 1154(c) makes clear that Indian country can exist on " fee-patented lands" in an Indian community. 18 U.S.C. § 1154 (excluding from "Indian country" under that section "fee-patented lands in non-Indian communities").

[11] *See Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, 125 (1993) (*quoting* F. Cohen, Handbook of Federal Indian Law 34 (1982 ed.)) ("'Indian country [consists of] all lands set aside *by whatever*

has focused on the federal government's trustee or guardianship responsibilities for a *community* of Indians, as "dependent people," regardless of who owns title to the land they use and occupy.[12]

Alaska Native tribes are similar to the 20 "scattered" Indian pueblos in *Sandoval*, all of which were found to be dependent Indian communities. Like the tribes in *Sandoval*, Alaska Natives villages are separate and isolated distinctly

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means for the residence of tribal Indians under federal protection . . . .'") (emphasis added); *United States v. John*, 437 U.S. 634, 649 (1978); *Creek Nation*, 295 U.S. at 109-110 ("The tribe [which held its land in fee simple title] was a dependent Indian community under the guardianship of the United States . . . [The tribe] was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests"); *Cramer v. United States*, 261 U.S. 219, 232 (1923) (A "duty of protection" arises from "[t]he general doctrine . . . laid down by this court that the Indian tribes are wards of the nation - communities dependent on the United States"); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 88-89 (1918) (describing Alaska Natives as "a dependent Indian people" and "dependent Indian tribes or communities"); *United States v. Pelican*, 232 U.S. 442, 450 (1914) ("[T]he fundamental consideration is the protection of a dependent people . . . yet wards of the nation, and . . . not . . . discharged [by Congress] from that condition").

[12]In a 1980 opinion, the Associate Solicitor for Indian Affairs concluded that fee ownership of ANCSA lands by village corporations does "not conflict with the continued status of Native villages as 'dependent Indian communities' since that status does not depend on the nature of title to land . . . . The continued existence of Indian country in Alaska . . . does not conflict with the purposes of the Settlement Act . . . . " "Liquor Ordinance, Village of Allakaket, Alaska," Sol. Op. (Oct. 1, 1980). Because this opinion is final -- unlike the 1993 Associate Solicitor's opinion relied on by Petitioner, which is "under review" -- and concerns the Executive Branch's post-ANCSA enforcement of federal Indian country laws in Alaska, the opinion has been lodged with the Clerk.

Indian communities recognized as tribes by the political departments of the government. They remain under federal protection and reside on lands that ANCSA set apart for them. 43 U.S.C. § 1602(j) (ANCSA lands are expressly *held* "for and on behalf of" Native villages). *See also* 43 U.S.C. §§ 1607(a), 1610(b)(1) & (b)(3), 1611(b), 1615(a) (ANCSA lands and other benefits are provided for "Native villages").[13] Nothing more is needed to establish these tribes as self-governing dependent Indian communities.

3. *The Federal Government Continues To Maintain Its Trust Relationship With Alaska Native Villages, Including Arctic Village and Venetie.*

In 1994, Congress once again recognized its *continuing* relationship with "Alaska Native tribe[s]," 25 U.S.C. § 479a(2),

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[13] ANCSA's principal objective is to protect the right of Alaska Native villages, as tribes, and their members to continue to exist and subsist on their ancestral lands. ANCSA, was enacted to fulfill the promise first made in section 8 of the Alaska Organic Act of May 17, 1884, 23 Stat. 24, that the Alaska Natives "shall not be disturbed in the possession of any lands actually in their use or occupation." *See* S. Rep. No. 92-405, at 75-76 (1971); 117 Cong. Rec. S17282 (Nov. 1, 1971) (Remarks of Senator Stevens) ("there are some 200 villages in Alaska . . . . They seek title to their land . . . . They want the land around their villages, which they have claimed as theirs for centuries"). Indeed, just prior to the passage of ANCSA, the House rejected two amendments to allow the Secretary of the Interior to remove Native villages from their lands. *See* 117 Cong. Rec. H9787-93, H9811-12 (Oct. 20, 1971); 117 Cong. Rec. H9791 (Remarks of Rep. Begich) ("The purpose of this bill is to confirm title to Native land that they have occupied for hundreds of years . . . . These villages and their people do not want just compensation [for ANCSA lands from which the Secretary removes them]; they want their land and continued existence").

including its trust responsibilities. The Federally Recognized Indian Tribe List Act of 1994, §103(2), 25 U.S.C. § 479a note, states that "the United States has a *trust responsibility* to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes." (Emphasis added). The significance of this recognition is highlighted in the House Report on the List Act.

> "Recognized" is more than a simple adjective; it is a legal term of art. It means that . . . a tribe . . . . [is brought] within Congress' legislative powers . . . . A formal political act, it permanently establishes a government-to-government relationship between the United States and the recognized tribe as a *"domestic dependent nation," and imposes on the government a fiduciary trust relationship to the tribe and its members*. Concomitantly, it institutionalizes the tribe's quasi-sovereign status, along with all the powers accompanying that status *such as the power to tax*, and to establish a separate judiciary. Finally, it imposes upon the Secretary of the Interior specific obligations to provide a panoply of benefits and services to the tribe and its members. In other words, unequivocal federal recognition of tribal status . . . establishes tribal status for all federal purposes. H. Rep. No. 103-781, at 2-3 (1994) (emphasis added).

Pursuant to the List Act, the Secretary of the Interior has recognized Arctic Village, Venetie, and 224 other Alaska Native villages as Indian tribes with whom the United States government has "a fiduciary trust relationship." They are thus "dependent Indian communities" within the meaning of 18 U.S.C. § 1151.

II. ANCSA DID NOT TERMINATE INDIAN COUNTRY IN ALASKA.

A. ANCSA Does Not Contain Express Language Terminating Indian Country in Alaska

Congressional intent to extinguish Indian country must be reflected by "clear and plain" language. *United States ex rel. Hualapai Indians v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 353 (1941). A similarly clear expression of legislative intent is necessary to terminate federal superintendence, *Bryan v. Itasca County*, 426 U.S. 373, 389-390, 392-393 (1976); *Williams v. Lee*, 358 U.S. 217, 221 (1959), and to terminate tribal powers of self-government. *Bryan*, 426 U.S. at 392-393; *Santa Clara Pueblo*, 436 U.S. at 60.

Despite Petitioner's best efforts, no such legislative intent can be extrapolated from the debates leading up to Congress' enactment of ANCSA. During the five years that Congress considered Alaska Native claims settlement measures, the legislative record is utterly devoid of any mention of the "dependent Indian community" form of Indian country.[14] The

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[14] ANCSA does revoke existing reservations, 43 U.S.C. § 1618(a). ANCSA also prohibits new Native allotments while permitting approximately 9,000 then pending allotment applications to be "approved." 43 U.S.C. § 1617(a). These allotments are granted subject to restricted fees and are administered by the Bureau of Indian Affairs in the same manner as trust allotments in all other states. But ANCSA did not eliminate other forms of Indian country covered by 18 U.S.C. § 1151. *See, e.g.*, "Governmental Jurisdiction of Alaska Native Villages Over Land Nonmembers," DOI Sol. Op. M-36,975, at 108 n. 271 (Jan. 11, 1993) (Metlakatla Indian Community and Chilkat Indian Village), 112 n. 277 (Angoon, Kake and Klawock), 123-124 (Village-owned townsite lands) & 124-30 (Indian country status of Native allotments and

record is equally silent with respect to terminating powers of tribal self-government. Nor does ANCSA terminate the federal government's fiduciary relationship with Alaska Native villages.[15] To the contrary, ANCSA explicitly recognizes a present and continuing federal wardship and trusteeship with respect to Alaska Natives. 43 U.S.C. § 1601(b) and (g)[16]; *see*

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individual Native townsite lots in Alaska, under 18 U.S.C. § 1151(c), not altered by ANCSA).

[15] Indeed the Senate passed a bill in 1970 that required all other federal agencies, except the Department of Health, Education and Welfare, to cease services to Alaska Natives. § 4(b)(1) of S. 1830, 91st Cong. 1st Sess. (1969); 116 Cong. Rec. S11302 (July 14, 1970). Section 4(b)(1) of that bill *was* intended to terminate the United States' trust relationship with Alaska Native tribes. 116 Cong. Rec. S11303 (colloquy between Sen. Harris and Sen. Jackson); *see also id.* at S11307-08, S11310-15, and S11319-23 (July 14, 1970) and S11421-25 (July 15, 1970) (debating and twice rejecting amendments to strike § 4(b)(1)). ANCSA, as enacted, dropped this provision.

[16] By stating that "the settlement should be accomplished . . . without creating a . . . lengthy wardship or trusteeship," ANCSA makes clear that the superintendence continues. Furthermore, the 1988 ANCSA amendments, Act of February 3, 1988, 101 Stat. 1788, continue the federal government's trusteeship into the foreseeable future by allowing for ANCSA lands to be protected from involuntary loss in perpetuity, 43 U.S.C. § 1636(d), and for ANCSA corporation stock to remain inalienable, with voting rights restricted to Native shareholders. 43 U.S.C. §§ 1606(h)(1), (h)(2) and 1629(c). Under these amendments, Alaska Native villages are assured that their use and occupancy of the lands village corporations "hold . . . for and on behalf of a Native village," 43 U.S.C. § 1602(j), will remain unimpaired in perpetuity. The 1988 ANCSA amendments, therefore, are a clear expression of the United States' "obligations of the highest responsibility and trust" with respect to these villages. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); *see also* H.Rep.No. 99-712, at 31 (1986) ("[T]he language of ANCSA makes it clear that it did not terminate the 'guardian-ward' status of Alaska Natives . . .").

also 43 U.S.C. § 1626(d). Moreover, in passing amendments to ANCSA in 1988, Congress explicitly disclaimed that the Amendments affected the Indian country status of any lands in Alaska. § 17(a)(2) of the Act of February 3, 1988, 101 Stat. 1814, 43 U.S.C. § 1601 note. Obviously, Congress did not believe that ANCSA's land settlement had terminated Indian country in Alaska in 1971, otherwise that disclaimer would have been unnecessary.[17]

That ANCSA did not terminate the dependent Indian community form of Indian country is most tellingly revealed by what ANCSA did not do. ANCSA did not repeal the Indian Reorganization Act ("IRA"), *see infra* at pp. 22-23, which confirms the powers of Indian tribal governments.[18] Nor did

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[17] A similar disclaimer was also enacted in 1982 in the Indian Tribal Government Tax Status Act. 26 U.S.C. § 7701(40)(B).

[18] Stevens Village's IRA Constitution, approved in 1990, confirms that the Village's jurisdiction encompasses "all lands customarily and traditionally used or owned by the Koyukon people. . . since time immemorial," including ANCSA lands. Articles II and III. The Constitution grants the Village "all the inherent powers of a federally recognized tribal government," including the powers "to raise revenues," maintain law and order, administer justice and enact ordinances. Article X, §§ 1 and 3. Circle Native Community's Constitution, approved in 1991, defines that Village's jurisdiction to include "all lands constituting the *dependent Indian community* of Circle as defined in Federal law." Art. II (emphasis added). The Community's powers are similar to those of Stevens Village. Art. VIII. These constitutions were federally approved only after a review concluded that they were not "contrary" to, *inter alia*, "any . . . Act of Congress." 25 U.S.C. § 476(c)(2)(B) and (3); § 102(1), Act of November 1, 1988, 102 Stat. 2938, 25 U.S.C. § 476 note. Obviously, the Secretary found that these constitutions of TCC member tribes were not "contrary" to ANCSA. Because these constitutions demonstrate that the federal government regards ANCSA lands as Indian country, *amicus* has lodged copies of these constitutions with the Clerk.

ANCSA repeal the Indian country jurisdictional disclaimer in § 4 of the Alaska Statehood Act of July 7, 1958, 72 Stat. 339, *as amended by*, § 2(a) of the Act of June 25, 1959, 73 Stat. 141. Nor did it repeal Public Law No. 83-280's extension of civil and criminal jurisdiction over Indian country to the Territory (then State) of Alaska, 18 U.S.C. § 1162(a); 28 U.S.C. § 1360(a), or application of Indian country liquor laws to Alaska tribal communities. 18 U.S.C. § 1161.[19] These laws all recognize that Alaska Native villages occupy "Indian country."

ANCSA's failure expressly to terminate Indian country in Alaska or to terminate any of the powers of self-government of Alaska Native tribes is dispositive. When Congress has in the past sought to end its trusteeship of particular Indian tribes or has sought to extinguish particular lands as Indian country, it has been crystal clear about its intent. Termination acts have always been explicit. For example, 25 U.S.C. § 661 states:

> The purpose of this Act is to provide for the termination of Federal supervision over the trust and restricted property of certain tribes and bands of Indians located in Western Oregon and the individual members thereof . . . and for a termination of Federal services furnished such Indians because of their status as Indians.

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[19] For example, the Secretary has "certified" the liquor ordinances of TCC member "tribe[s] having jurisdiction over . . . Indian country." 18 U.S.C. § 1161. *See* 51 Fed. Reg. 28779 (Aug. 11, 1986) (Village of Minto's Liquor Ordinance exercising jurisdiction over "all lands within the exterior boundary of lands selected" under ANCSA); 48 Fed. Reg. 30195 (June 30, 1983) (Native Village of Northway Liquor Ordinance); 48 Fed. Reg. 21378 (May 12, 1983) (Native Village of Chalkyitsik); and DOI Sol. Op., *supra* (October 1, 1980) (Village of Allakaket Liquor Ordinance operates within a "dependent Indian community").

Similarly, 25 U.S.C. § 722 states:

> Upon the conveyance to the State of Texas of the lands held in trust by the United States for the Alabama and Coushatta Tribes of Texas, the Secretary of the Interior shall *publish in the Federal Register a proclamation declaring that the Federal trust relationship to such tribe and its members has terminated.* Thereafter such tribe and its members will not be entitled to any of the services performed by the United States for Indians because of their status as Indians.[20] *Id.* (emphasis added)

Clearly, Congress understood how to terminate its trust relationship with Indian tribes and to extinguish Indian country in Alaska. It simply chose not to do so. *See Bryan*, 426 U.S. at 389-390 (noting that the express language of the termination acts was "cogent proof that Congress knew well how to express its intent directly when that intent was to subject reservation Indians to the full sweep of state laws and state taxation").

B. ANCSA Follows in a Long Line of Congressional Acts That Establish the Federal Superintendence of Alaska Native Villages.

Petitioner seeks to portray ANCSA as a dramatic departure from prior congressional legislation concerning Indian affairs in Alaska. Nothing, however, could be further from the truth.

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[20] *See also* 25 U.S.C. §§ 564, 564q and 564r (termination of the trust relationship with the Klamath Indians); 25 U.S.C. §§ 741 and 757 (Paiute Indians); 25 U.S.C. §§ 791, 803-804 (Wyandotte Tribe) (repealed); 25 U.S.C. § 821 (Peoria Tribe) (repealed); 25 U.S.C. § 841 (Ottawa Tribe) (repealed); 25 U.S.C. § 891 (Menominee Tribe) (repealed); 25 U.S.C. § 935 (Catawba Tribe); 25 U.S.C. §§ 971, 980 (Ponca Tribe).

ANCSA is simply the latest in a series of congressionally enacted treaties and statutes that superintend the affairs of Indian tribes by developing and promoting tribal independence.

Prior to ANCSA, the most notable such enactment in this century was the 1934 IRA, also known as the Wheeler-Howard Act, 25 U.S.C. § 461 *et seq*. Congress enacted the IRA because it was "[n]ot satisfied solely with centralized government of Indians," *Williams*, 358 U.S. at 220. The "intent and purpose [of the IRA] . . . was 'to rehabilitate the Indians economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism,'" *Mescalero Apache Tribe*, 411 U.S. at 152 (1973) (internal citation omitted), and to "disentangle the tribes from the official bureaucracy." *Id.* at 153. According to Senator Wheeler, the IRA "'seeks . . . to give the Indians the control of their own affairs and *of their own property*; to put it in the hands either of an Indian council or in the hands of a corporation to be organized by the Indians.'" *Id.* at 152 (quoting 78 Cong. Rec. 11125) (emphasis added).

The IRA provides for chartering federal corporations through which tribes would have the

> power to purchase, take by gift, or bequest, or otherwise, *own*, hold, manage, operate, and dispose of property of every description, *real* and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business. . . . 25 U.S.C. § 477 (emphasis added).

This provision (and 25 U.S.C. § 476) has been construed as "encourag[ing] tribal governments . . . to become stronger and more highly organized." *Williams*, 358 U.S. at 220.

The goal of the IRA -- to diminish active federal control over Indian tribes and to enhance and promote tribal independence through use of the "corporate model" -- is virtually indistinguishable from ANCSA's goal. The IRA is clearly a direct antecedent to ANCSA. This Court has ruled that the IRA did not terminate the federal trust responsibility. *Mescalero Apache Tribe*, 411 U.S. at 152.[21] For the same reason, ANCSA also did not.

ANCSA is itself simply another exercise of Congress' superintendence of the affairs of Indian tribes. Like the IRA, ANCSA grew from the most recent era of the federal-tribal trust relationship, which is characterized by a commitment to protect Indian tribes as self-governing communities. Indeed, ANCSA was proposed as part of President Nixon's Indian self-determination policy. H. Rep. No. 92-523, at 19, 22 (1971) (statement of the Secretary of the Interior noting that the President hoped to "strengthen[] the management by Indian groups of their own institutions and organizations of government"). In adopting ANCSA, Congress also was motivated by a commitment to self-determination for Alaska Natives. *See* H. Conf. Rep. No. 92-746, at 37 (1971); 43 U.S.C.

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[21] In enacting ANCSA, Congress left intact those provisions of the IRA which Congress had expressly extended to Alaska Natives. *See* 25 U.S.C. § 473a. *See, e.g.*, 25 U.S.C. § 465 (permitting lands to be acquired in trust for Alaska Native tribes), § 467 (permitting new Indian reservations to be created for Alaska tribes) § 470 (authorizing federal loans to Indian-chartered corporations for "economic development"), § 476 (recognizing the right of Alaska tribes to adopt constitutions for the exercise of inherent sovereign powers and other specified powers of self-government) and § 477 (recognizing the right of tribes to charter federal corporations for economic development purposes). They and the 1994 IRA amendments, 25 U.S.C. § 476(f) and (g), demonstrate that the federal government's superintendence of Alaska Native tribes is ongoing.

§ 1601(b) ("the settlement should be accomplished . . . with maximum participation by Natives in decisions affecting their rights and property").

Thus, the purpose of ANCSA, including its creation of village and regional corporations, was to foster self-government and self-determination in Alaska Native communities. As explained above, *infra* Part I.C, that goal is wholly consistent with the federal government's ongoing trust relationship with Alaska Native tribes and those tribes' status as "dependent Indian communities." Acceptance of petitioner's argument, however, would mean that, because of ANCSA, Alaska Native tribes would no longer have the right to govern their own communities -- including taxing those whose activities burden the community. Because this plainly does violence to Congress' expressed intent, this Court should reject Petitioner's revisionist interpretation of ANCSA.[22]

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[22] That Congress did not intend to terminate the "dependent Indian community" status of Alaska Native tribes is further underscored by the oft-repeated observation by members of Congress on the eve of ANCSA's enactment that the "Alaska Native people as a group are among the most disadvantaged citizens of the United States in terms of income, employment, educational attainment, life expectancy, health, nutrition, housing, and every important indicator of social welfare." Remarks of Sen. Henry Jackson, Chairman of the Senate Committee on Interior and Insular Affairs, 117 Cong. Rec. S17278 (November 1, 1971). Given these statements by ANCSA's principal sponsor, Alaska's argument that Congress intended to abandon its trust responsibility to the most vulnerable and dependent people in America is both unfounded and unthinkable.

C. ANCSA CLEARLY CONTINUES FEDERAL SUPERINTENDENCE TO PRESERVE ALASKA NATIVE TRIBES' USE AND OCCUPATION OF THEIR TRIBAL LANDS

Petitioner argues that ANCSA's conveyance to Native corporations of lands that had historically been used and occupied by Alaska Native villages repudiated the federal trust obligations to those villages, and ended federal superintendence of those lands. That is plainly wrong.

First, the lands were expressly conveyed to Native village corporations to "hold . . . for and on behalf of" Native villages. 43 U.S.C. § 1602(j).[23] *Second*, the Native villages themselves were authorized by Congress to "organize" those corporations, and to prepare their articles of incorporation. 43 U.S.C. § 1607(a) & (b). *Third*, ANCSA imposed detailed restrictions on those corporations, all of which are designed to ensure that the corporations will in fact hold the lands for the benefit of Native villages.[24] *Fourth*, ANCSA required annual and other reports so that Congress could actively monitor whether the Native corporations were fulfilling their responsibilities to the Native villages. *See* 43 U.S.C. § 1622; 43 U.S.C. § 1601(c).

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[23] *Amicus* endorses the argument of Respondents that ANCSA set apart settlement lands for the Alaska Native tribes. *See supra* note 13.

[24] *See, e.g.*, 43 U.S.C. § 1606(g) (issuance of stock limited to Natives); 43 U.S.C. § 1606(h)(1) (corporate stock owned by Natives is subject to restrictions on alienation); *id.* (exempting dividends from alienation); 43 U.S.C. § 1606(h)(2) (forbidding non-Native beneficiaries from voting their stock); 43 U.S.C. § 1627 (limitations on mergers and exemptions from standard corporate law requirements for authorized mergers). To carry out its provisions, ANCSA supplants most of Alaska's substantive corporation law.

Indeed, Congress *has* actively monitored Native corporations and has imposed *additional* statutory restrictions on them in order to ensure that lands held by those corporations will be preserved and used for the benefit of Native villages.[25] These new restrictions would have raised serious concerns under the Takings Clause but for the fact, as Congress noted, that ANCSA

> did *not terminate* the special relationship between Alaska natives and the United States nor abolish Congress' *unique obligation* toward them. The numerous limitations placed upon the corporate entities and their funds *and lands*, the restriction on alienation of the stock, and the *special provisions* made for the corporate entities make clear that Congress intended to retain its power to deal with the affairs and property of the Natives.

H. Rep. No. 100-31 at 21-22 (1987) (emphasis added).

Congress clearly understood ANCSA to *continue* federal trust obligations towards Alaska Native villages -- which in our view is sufficient -- and even to continue federal superintendence of lands conveyed to Native corporations for the benefit of those villages. By enacting ANCSA Congress was not, as Petitioner suggests, washing its hands of further responsibility for Alaska Native villages; instead, it was

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[25]Congress has amended ANCSA 29 times since 1971. *See e.g.*, Pub. L. No. 94-204, Act of June 2, 1976, 89 Stat. 1145 (altering land selection provisions for particular regional corporations); the 1988 ANCSA amendments, Act of February 3, 1988, 101 Stat. 178 (protecting ANCSA lands from involuntary loss, 43 U.S.C. § 1636(d), and restricting voting rights of ANCSA corporation stock to Native shareholders and preserving inalienability of stock, §§ 1606(h)(2), (h)(3), and 1629(c)).

fulfilling that trust responsibility.

III. ACTS OF CONGRESS SUBSEQUENT TO ANCSA CONFIRM CONGRESS' INTENT TO PRESERVE ALASKA NATIVE TRIBES' POWERS OF SELF-GOVERNMENT AND TO MAINTAIN THOSE TRIBES' DEPENDENT STATUS.

Following ANCSA, Congress quickly enacted two other Indian self-determination measures proposed by the Nixon Administration and frequently cited as foundations of the current federal policy to superintend Indian tribes by maximizing tribal independence and self-government. In 1974, Congress enacted the Indian Financing Act, 25 U.S.C. § 1451 *et seq.*, which was intended to " help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources." In 1975, Congress enacted the Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. § 450 *et seq.*, which provides:

> [t]he Congress declares its commitment to the maintenance of the Federal Government's unique and *continuing relationship with and responsibility to the Indian people* through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. 25 U.S.C. § 450a(b) (emphasis added).

In 1984, Congress again confirmed the vitality of Indian

country in Alaska by amending 28 U.S.C. § 1360(a) to change "Territory" to "State" of Alaska. § 110 of the Act of July 10, 1984, 98 Stat. 342. Had ANCSA extinguished Indian country, as Petitioner claims, Congress would have repealed this section, rather than amend it.

In 1988, Congress added language to the end of section 450a(b) of the ISDA that reaffirms the federal trust responsibility: "In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities." These purposes were to be implemented *without* "the termination of any existing trust responsibility of the United States with respect to the Indian people." 25 U.S.C. § 450n(2). *See also* Section 1(d)(1) of the "model agreement" set forth in 25 U.S.C. § 450*l*(c). Thus Congress has consistently recognized, and stressed, that its policy of encouraging increasing Indian autonomy and independence is *not* inconsistent with continuation of a federal trust responsibility for Indian tribes and people. 25 U.S.C. § 2701(4); 25 U.S.C. § 3601(2); 25 C.F.R. §§ 32.1, 32.3 & 32.4 (implementing the federal trust responsibility to Alaska Native villages and other tribes pursuant to Title XI of the Education Amendments of 1978, 25 U.S.C. § 2000 *et seq.*).

The Tribal Self-Governance Act of 1994 ("TSGA"), 25 U.S.C. § 458aa *et seq.*, is the latest Indian self-determination act. It provides tribes with an opportunity, greater than any preceding law, to supervise and manage federal Indian programs and services. In § 203 of the Act, 108 Stat. 4271, 25 U.S.C. § 458aa note, Congress determined "to permanently establish and implement [the policy of] tribal self-governance."

Again, however, the TSGA expressly does *not* "diminish the Federal trust responsibility to Indian tribes." 25 U.S.C. § 458ff(b). *See also* 25 U.S.C. § 458cc(a).

Pursuant to the TSGA, Arctic Village, Venetie and some 30 other Alaska Native villages, through TCC, have entered into two TSGA compacts with the federal government. Both unequivocally reaffirm the trust responsibility to the participating tribes. *See* Art. I, § 2(a) and (c), Art. IV, § 1, and the preceding "whereas" clauses. These compacts so fatally undermine Petitioner's claim that ANCSA ended federal superintendence of Alaska Native villages that *amicus* has lodged them with the Clerk.

Many other post-ANCSA acts of Congress also demonstrate a clear purpose to strengthen the ability of tribes, including Alaska Native villages, to govern their tribal communities, without diminishing the federal government's trust responsibility. Particularly important among these are several acts that deal with the jurisdiction and sovereignty of Indian tribes, including the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.* (enhancing the jurisdiction of Alaska Native villages to determine the custody of Native children as part of the federal "responsibility for the protection and preservation of Indian tribes," 25 U.S.C. § 1901(2)); the Indian Tribal Government Tax Status Act, 26 U.S.C. § 7871 (providing excise tax exemptions for transactions involving "the exercise of an essential governmental function of the Indian tribal government," 26 U.S.C. § 7871(b)),[26] and the

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[26] Pursuant to 26 U.S.C. § 7701(40), the Secretary of the Treasury, "after consultation with the Secretary of the Interior" determined that Alaska Native villages, including Arctic Village and Venetie "exercise governmental functions." *See* Rev. Proc. 83-87 (December 12, 1983),

Public Safety Partnership and Community Policing Act ("PSPCPA") of September 13, 1994, 108 Stat. 1807 (making tribes, including Alaska Native villages, eligible for a broad range of law enforcement and criminal justice grants).[27]

CONCLUSION

The judgment below should be affirmed.

1983 IRB No. 50, pp. 6, 11-12. The Secretary also defined "essential governmental function" as a type of function eligible for Snyder Act, 25 U.S.C. §13, funding and ISDA grants or contracts. 26 C.F.R. §305.7871-1(d)(1) and (2). All Alaska Native villages receive Snyder Act funding and participate in ISDA grants and contracts. *See also* H.Conf.Rep. No. 97-984, at 15 (1982) (explaining that the Tax Status Act applies only to "tribal government[s]. . . recognized by the Treasury Department (after consultation with the Interior Department) as exercising sovereign powers . . . . *includ[ing] the power to tax*, the power of eminent domain, and police powers (such as . . . zoning, police . . . and fire protection")) (Emphasis added).

[27] Since enactment of this law, 19 Alaska Native village tribal governments, including Arctic Village, have received Community Oriented Policing Services grants to hire tribal police and purchase law enforcement equipment. More than one-quarter of all funds granted under this law to governments in Alaska have gone to Alaska Native villages. Prior to the PSPCPA, the tribes in Alaska received grants pursuant to § 901(a)(3) of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3791(a)(3), *as added by* Pub. L. No. 96-157, 93 Stat. 1167, *as amended by* the Justice Assistance Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837. Under this Act, the Secretary of the Interior was required to identify "tribes performing law enforcement functions" The Secretary identified 198 Alaska Native villages in 1988, 53 Fed. Reg. 33872-75. These functions included employing tribal police, establishing a tribal court, undertaking correction functions, and preventing adult and juvenile delinquency. 53 Fed. Reg. 33867 (September 1, 1988).

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October Term, 1997

STATE OF ALASKA,

Petitioner,

v.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF ALASKA FEDERATION OF NATIVES, ALASKA INTER-TRIBAL COUNCIL, KETCHIKAN INDIAN CORPORATION AND NATIVE VILLAGE OF NINICHICK, VILLAGE CORPORATIONS OF EMMONAK, INALIK, KOTLIK UPIK, AND NUNAMIUT, ALASKA PENINSULA CORPORATION, BRISTOL BAY HEALTH CORPORATION, ALASKA COMMUNITY ACTION PROGRAM (RURAL CAP), NORTHWEST ARCTIC BOROUGH, AND CITIES OF AKIAK, CHEFORNAK, EEK, GOODNEWS BAY, NEWHALEN, PLATINUM, AND QUINHAGAK AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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Final Eligibility of Native Villages, 38 Fed.Reg. 26217, Sept. 19, 1973 18

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Internal Revenue Service Cumulative Bulletin 1984-1 25

Internal Revenue Service Cumulative Bulletin 1983-2 25

ARTICLES AND MISCELLANEOUS:

Anchorage Daily News, *Indian Country: Two Destinies, One Land*, Special News Section, June 29-July 5, 1997 ..... 15, 23, 24, 25, 26, 27

J.E. Angell, *Public Safety and the Justice System in Alaska* (Jan. 1981) 26, 27

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Memorandum of Division of Legal & Research Services, Legislative Affairs Agency, State of Alaska, addressed to Senator Al Adams, dated May 29, 1997 22

Federal Field Committee for Development Planning in Alaska, *Alaska Natives and the Land*, transmitted to Congress, Oct. 1, 1968 ..... 3, 4, 5, 6, 10, 11

Handbook of Federal Indian Law (1982 ed.) 7, 9, 28

A. Hippler & S. Conn, *The Village Council and its Offspring: A Reform for Bush Justice*, 5 UCLA-Alaska L.R. (1975) 27

Ordinance, 89-13, Northwest Arctic Borough 25

Interest of amici[1]

Amicus Alaska Federation of Natives (AFN) is the largest Native organization in Alaska. Its membership includes 178 Native villages, 13 regional corporations, and 12 regional non-profit corporations. In accordance with its charter and by-laws, AFN authorized the filing of this brief on behalf of its membership.

Amicus Alaska Inter-Tribal Council is a statewide tribal advocacy organization with 171 Alaska Native tribes as members.

Amici Ketchikan Indian Corporation, IRA Council, and Ninichick Village, are federally recognized Indian tribes.

Amici Emmonak Corporation, Inalik Native corporation, Kotlik Yupik Corporation, and Nunamiut Corporation are village corporations organized pursuant to the Alaska Native Claims Settlement Act. Amicus Alaska Peninsula Corporation is a consortium of five tribes, which delivers federal Indian services to its members under contract with the United States. Amicus Bristol Bay Area Health Corporation is a consortium of 32 tribes, which delivers health care to its members under contract with the United States.

Amicus Alaska Community Action Program (RurAL CAP) is a statewide non-profit corporation committed to village tribal rights of self-governance.

Amicus Northwest Arctic Borough is a state-chartered municipal government, which contains eleven Native villages. Amici Cities of Akiak, Chefornak, Eek, Goodnews Bay, Newhalen, Platinum, and Quinhagak are state chartered municipal corporations.

Amici and their members share a common interest in preserving the Native communities' ability to effectively govern themselves and their territory.

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the amici curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Summary of Argument

In 1971, Congress passed the Alaska Native Claims Settlement Act (ANCSA) to settle long-outstanding and extensive aboriginal land claims of Alaska Natives. The Act settled the Natives' claims by extinguishing aboriginal title and substituting therefore smaller areas for the support of the Natives' way of life and titled to corporations controlled by the Natives. In doing so, the Act provided for the continuation of Indian country in Alaska. Although the present status of each such territory must be determined on a case by case basis, the present circumstances of the Natives villages in general show the present existence of dependent Indian communities in Alaska.

Argument

I. At the time of the enactment of ANCSA, the Native villages of Alaska were Indian country in fact and in law.

Congress deliberated on Alaska land claim issues for more than four years before it enacted the Alaska Native Claims Settlement Act, 43 U.S.C. §1601 et seq., developing a voluminous record on the condition and land claims of Alaska Natives. This record, which obviously informed the final terms of ANCSA, shows the Native villages as Indian country in fact – villages occupied almost exclusively by Natives, governed in the traditional way, and dependent upon the resources of their territory for their existence. This same record demonstrates the villages' aboriginal title to their territories – which title constitutes Indian country as a matter of law.

ANCSA must be placed against this backdrop – the Native villages as Indian country in fact and in law – and construed to preserve that which Congress did not expressly extinguish.

A. At the time of ANCSA, Native villages – the basic units around which Native life, government, and subsistence activities were organized – were the paradigm of Indian country.

The State of Alaska is a large, ecologically diverse place. Its east-west span stretches 2,000 miles and its north-south span 1,100 miles. It totals 375 million acres. Federal Field Committee for Development Planning in Alaska, *Alaska Natives and the Land*, transmitted to Congress on October 1, 1968 at 89.[2] The State ranges in climatic extremes from the moderately mild marine areas in the southeast to the Arctic zone north of the Rocky Mountain System divide. *Id.* at 89. The Natives adapted themselves to live with and off this varied land, which meant great variation among the villages in their subsistence patterns. Nevertheless, the villages of 1968 had important traits in common.

The villages were isolated, almost exclusively Native, and contained the overwhelming majority of Alaska's Natives. Of the approximately 53,000 Natives in the state in 1968, two-thirds lived in Native villages.[3] Most such villages

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[2] Early in its deliberations on the subject, Congress realized the complexity of Alaska Natives' aboriginal title claims. Consequently, Congress commissioned the Federal Field Committee for Development Planning in Alaska to report to it on the Alaskan Native land claims. One volume of this report, titled *Alaska Natives and the Land*, is a detailed and thorough study of the Alaska villages and the villages' close connection to their land immediately preceding the enactment of ANCSA. *See* S. Rep. No. 92-405, 92d Cong., 1st Sess. at 73-74 (1971), describing the report as having, "provided to a very large extent both the background information necessary to an understanding of the land claims issue and a suggested framework of alternative methods by which the complex legal, social and economic problems presented could be resolved." The following overview of the villages is drawn largely from this report to Congress. A copy of *Alaska Natives and the Land* is lodged with this brief for the Court's convenience.

[3] In fact, up until World War II, Natives remained the majority population in the entire State of Alaska. When non-Natives moved into the

were small, with an average population of 155, an overwhelming majority of whom were typically Native. None was an urban place. *Id.* at 5-6. Less than a dozen villages were on the state's limited road network, with access to the others limited to air only or, seasonally, by boat or snowmobile. *Id.* at 42. None of the villages had electricity and only 23 had telephone service, precluding communication with the villages except by letter or radio.[4] *Id.* at 45.

"Characteristic of village Alaska is the widespread use of aboriginal languages, and, except for conversation with government people or other whites, avoidance of English." *Id.* at 45. Aboriginal governments also prevailed in Alaska's villages. Of the 178 villages surveyed in 1968, 84 had a traditional form of government only, with leaders selected through customary means or open election. Another 14 villages had no formal government structure, but managed their affairs and territory through village councils of some form. The remaining 80 villages were organized formally under either the Indian Reorganization Act (IRA)[5] or state law.

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state, they generally settled in the southern and coastal regions, far away from most Native villages. As a result, even when the Native population became the minority of the state overall, the villages remained overwhelmingly Native. *Alaska Natives and the Land* at 435.

[4] Most villages had radio transmitters and receivers, but these were owned by schools. Education and supporting facilities were the highest fiscal expenditures by the United States on behalf of Alaska Natives in fiscal year 1968. That year, the Bureau of Indian Affairs expended about $20 million for operation of its schools, teachers' quarters, new construction, and maintenance of existing facilities. The second largest federal expenditure in 1968 was $16.5 million by the Division of Indian Health for Alaska Native health care. Together, these two agencies expended approximately $43 million in 1968 for services to Alaska Natives. *Alaska Natives and the Land* at 31.

[5] Act of June 18, 1934, 48 Stat. 984, codified at 461 et seq. Not all provisions of the 1934 act applied to Alaska. In 1936, Congress extended the remaining provisions of the act to Alaska Natives; this act also authorized the Secretary of the Interior to designate Indian reservations in

Oftentimes, a village was organized in more than one form or under more than one law. Of the 59 surveyed villages that were chartered under the IRA in 1968, 22 were also incorporated as first, second, or fourth class cities under state law, making them eligible for state revenue sharing funds. Another 19 villages were incorporated under state law only. *Alaska Natives and the Land* at 47.

The village governments applied both customary and state law, being literally the only governments exercising any authority over the vast areas claimed by aboriginal title.[6] Alaska law provided for the formation of area government known as boroughs. In 1968, nine boroughs had been organized which served the non-Native population centers of the state; only 13 villages were located within these boroughs. All other villages were located in the "unorganized borough" for which the state legislature could sit as a borough assembly. The Alaska Legislature never acted as an assembly for the unorganized borough, leaving the villages as the only functioning governments on the ground. *Id.* at 48.

The final, and for present purposes, most important trait common to the Native villages was their dependence upon their territory. "Residing in this land of contrast are native peoples with varied ethnic origins and cultural traits. Throughout history and still today they share one great thing in common – their dependence upon the land and its waters for their very existence." *Id.* at 91.

The Natives' subsistence activities varied from region to region in Alaska, with the villages within each region relying

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Alaska upon vote of the adult Natives living within the proposed reservation. *See* Act of May 1, 1936, 49 Stat. 1250, codified at 473a; *see generally Alaska Natives and the Land* at 436-437.

[6] In 1958, Congress extended territorial law (and upon statehood, state law) to Indian country in Alaska. Act of August 8, 1958, 72 Stat. 545. It is not surprising, then, that the villages would apply state as well as tribal law. *See In re McCord,* 151 F.Supp. 132 (D. Alaska 1957), holding that Indian country existed in Alaska where there was a functioning tribal government.

on the same biotic or marine resources and exhibiting similar subsistence patterns as a result. *See id.* at 141-142, comparing seasonal, migratory subsistence patterns with more permanent villages engaged in marine subsistence activities. Whatever their subsistence pattern, the villages were as fully aware of their boundaries "as if fences had been erected." *Id.* at 145. The extent of boundaries depended upon the relationship between acreage required for subsistence maintenance and the carrying capacity requirements for different species of wildlife, resulting in the reliance of any given village upon literally thousands of square miles to support life. *Id.* at 160-162.

The details of all regions' subsistence activities in 1968 were reported to Congress. In most regions, these activities differed little from those conducted historically. "[T]he means have changed – natives now use rifles and outboard motors – but the end is the same, i.e., food is secured for survival from one of the harshest environments in the world." *Id.* at 176. Congress was also provided a complete list of historic and contemporary Native villages and descriptions of the territories subject to the villages' subsistence activities, effectively documenting the Native's aboriginal title claims. *Id.* at 85-285; *see also Tee-Hit-Ton v. U.S.*, 348 U.S. 272 (1959), regarding Indian title in Alaska.

In the last decades before ANCSA, villages sought protection for their aboriginal territory through the creation of reserves for their benefit. In the 1940's, six reservations were created under the IRA, *supra*. By 1968, more than one hundred additional petitions for IRA reserves had been filed by villages. Because of non-Native opposition to reservations, these petitions languished for years at the Department of the Interior with no action taken on them before the passage of ANCSA. *Alaska Natives and the Land* at 443; *see also* D. Case, *Alaska Natives and American Law* (1984), ch. 3., on Alaska reservation policy and history.

B. The pre-ANCSA aboriginal territories of the Native villages plainly constituted Indian country as a matter of law.

Aboriginal title, also known as original Indian title, is the purest form of Indian property rights. It stems from the Natives' own long-standing connection to and dominion over a known territory. Unlike other Indian property rights, it does not depend for its existence upon a grant or confirmation of rights from the United States. Recognized by European powers upon their arrival on the continent as well as by the United States, it assured the continued existence of Native peoples in their aboriginal state, until and unless the dominant government provided otherwise. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 573-574 (1823); *see generally* Cohen, *Original Indian Title*, 32 Minn. L. Rev. 28 (1947). Under current federal law, it is a federally protected property right that cannot be disturbed by third parties. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974); *United States ex rel. Hualpai Indians v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941).

In *Bates v. Clark*, 95 U.S. 204 (1877), this Court, faced with the task of defining Indian country without guidance from Congress, held that Indian country was determined by reference to aboriginal title.[7] In this Court's words, "The simple criterion is that . . . it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no

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[7] The term "Indian country" was used in the 1790, 1793, 1796, and 1799 temporary versions of the Indian Trade and Intercourse Act, but was undefined. Congress first defined the term in the 1834 permanent version of the act, Act of June 30, 1834, 4 Stat. 729, to mean land "to which the Indian title has not been extinguished . . . " *Id.*, §§1, 29. The definition of Indian country was deleted in the 1874 revised statutes, but the substantive provisions of the act which employed the term were carried forward, leaving the task of defining the term to the court. *See Handbook of Federal Indian Law* (1982 ed.) at 30-32.

longer." *Id.* at 208; *see also U.S. v. Chavez*, 290 U.S. 357, 364 (1933); *Clairmont v. U.S.*, 225 U.S. 551, 557 (1912).

When Congress codified the more expansive definition of Indian country in 1948,[8] it uncoupled reservation status from Indian ownership. *Solem v. Bartlett*, 465 U.S. 463, 468 (1984). As a result, Indian title is no longer necessary to constitute Indian country under 18 U.S.C. §1151(a), but Indian title remains sufficient to constitute Indian country under 18 U.S.C. §1151(b). The purpose of the 1948 statute was to expand, not restrict, the scope of Indian country. *Donnelly, supra*; *State v. Dana*, 404 A.2d 551, 555 (Me. 1979). Further, the Indian title/Indian country rule of *Bates v. Clark* has not been overruled. The rule has been criticized as too restrictive, but the rule still obtains *as to land held in Indian title*. "With reference to the country that was formerly subject to the Indian occupancy, the cases cited [*Clairmont, supra*, and others] furnish a criterion for determining what is Indian country." *State v. Dana, supra*; *see also Donnelly, supra* at 269.

In current parlance, the *Bates v. Clark* line of cases demonstrates that territory held under Indian title must be considered as "set aside" for those Indians as a matter of law: it is dedicated to the federal purpose of providing for the support of Natives in their aboriginal custom, pending any

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[8] In the decades following *Bates v. Clark*, the Court tailored the definition of Indian country to varied Indian land tenures and increasingly complex Federal Indian policy. *See Donnelly v. U.S.*, 228 U.S. 243 (1913) [holding territory set aside as a reservation Indian country]; *United States v. Sandoval*, 231 U.S. 28 (1913) [holding that fee title held by pueblos under Spanish land grants constituted Indian country]; *United States v. Pelican*, 232 U.S. 442 (1914) [holding that a single trust allotment is Indian country]; and *United States v. McGowan*, 302 U.S. 535 (1938) [holding that trust land acquired by United States for Indians after statehood is Indian country.] Congress codified this more expansive definition of Indian country in 1948. *See* 18 U.S.C.A. §1151, Historical and Revision Notes (West 1963), referring to the *McGowan* and *Sandoval* decisions.

change in such by the United States.[9] *See Oneida Indian Nation v. County of Oneida, supra.* Under this rule, the territory occupied by Alaska's Native villages constituted Indian country before the passage of ANCSA.

II. ANCSA provided for the continued existence of Indian country in Alaska as to lands surrounding and set aside for the benefit of designated Native villages.

Where a federal relationship exists with an Indian tribe, Congress must explicitly state its intention to terminate that relationship. *Menominee Tribe v. United States*, 391 U.S. 404, 412 (1968). Where a territory has been set aside for the occupancy of a tribe within the meaning of the Indian country statute, Congress must explicitly state its intention to terminate that status. *Solem v. Bartlett, supra.* In all such instances, the congressional act must be construed as understood by the Indians.[10] Construed by reference to these rules, it is plain that Congress did not intend in ANCSA and the Natives did not understand that ANCSA terminated Indian country in Alaska.

While ANCSA expressly extinguished aboriginal title in Alaska [43 U.S.C. §1603] and revoked reservations previously created in Alaska under authority of Executive Order,

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[9] As demonstrated by Respondent, 18 U.S.C. §1151(b) has been generally construed in recent case law to require federal superintendence over the Indians in question and a federal set aside of the territory in question to establish a dependent Indian community. *See* Respondent's Br. II,C. The preceding section demonstrates that Alaska's Native villages were clearly subject to federal superintendence before the passage of ANCSA. The *Bates v. Clark* line of cases addresses the set aside criterion.

[10] *See Choctaw Nation v. United States*, 397 U.S. 620 (1970); *Jones v. Meehan*, 174 U.S. 1 (1899). While applied by the Court there to Indian treaties, this and other canons of construction apply to Indian statutes as well. "The essential policy for the development of the canons in treaty cases was not based on the form of the transaction, a treaty, but rather was rooted in the special trust relationship between the United States and Indian tribes." *Handbook of Federal Indian Law* at 223-224.

the IRA, or special legislation [*Id.*, §1618], ANCSA did not expressly extinguish any other form of Indian country in Alaska.[11]

To the contrary, Congress simply provided for a substitute land tenure for Native villages – in the place of expansive aboriginal title, Congress provided for the conveyance of more limited land bases to village corporations in fee title dedicated to the villages' benefit in general and the support of traditional way of life in particular. This substitute territory was "set aside" under federal law for the benefit of Natives, thereby confirming such territory as dependent Indian communities as of the date of ANCSA.[12]

The continuing Native character of each territory and its present status as Indian country must be determined on a case

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[11] For example, Congress had provided in 1906 for the issuance of allotments to Alaskan Natives in the amount of 160 acres of nonmineral lands. Act of May 17, 1906, 34 Stat. 197, as amended by Act of August 2, 1956, 70 Stat. 954. By 1968, 15,216 acres had been granted to 175 Native allottees under these acts. *Alaska Natives and the Land* at 451. The allotments are Indian country under 18 U.S.C. §1151(c). *U.S. v. Pelican*, *supra*. In addition, Natives were permitted to select lots from the public domain under the Native Townsite Act, Act of May 25, 1926, 44 Stat. 629, *repealed* by the Federal Land Policy Management Act, 43 U.S.C. §1701 et seq. ANCSA repealed the Secretary's authority to issue further allotments, but did not terminate allotments previously granted under either the 1906 or 1926 acts.

[12] The earliest cases construing the dependent Indian community subsection of 1151 looked to "the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area." *United States v. Martine*, 442 F.2d 1022, 1023 (10th Cir. 1971). By the 1980's, the test became more formally stated as requiring federal superintendence over the tribe and a federal set aside of the territory in question. *State of Alaska v. Venetie*, 101 F.3d 1286, 1293, *cert. granted* 117 S.Ct. 2478. Not surprisingly, then, Congress did not use the current parlance on dependent Indian community when enacting ANCSA in 1971, but as demonstrated here the Act's provisions had the same affect.

by case basis, but ANCSA plainly established a framework for the continuation of Indian country in Alaska.

A. Congress' deliberations leading up to the passage of ANCSA show a consistent intention to substitute one Native land tenure for another, for the dual purposes of providing for the villages' continued way of life and creating opportunities for economic development.

As part of its detailed factual report to Congress, the Field Committee encouraged Congress to take into account three considerations in any Alaska Native land claim settlement: first, the villages must be the focus of a settlement, since the villages laid claim to Alaska through their use and occupancy of the land; second, the surface rights should be severed from the subsurface rights, since the former supported subsistence activities and the latter were important as an economic development tool; and third, the identifiable villages must have the right to select surface rights to land. *Alaska Natives and the Land* at 3, ["in proposed settlements affecting land, it is they who are the principal focus: the Natives of village Alaska"], 287, and 441 [quoting from President Johnson's March 6, 1968, Message to Congress, "Give the native people of Alaska title to the lands they occupy and need to sustain their villages."] These themes appeared in all the bills considered by Congress.

From 1968 forward, Congress focused on the villages and their need for land to support their way of life as a fundamental component of any proposed settlement.[13] Through various means, the early bills clearly identified the access of villages to traditional subsistence areas as a primary goal in the award

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[13] *See Alaska Native Land Claims*, Hearings before the Committee on Interior and Insular Affairs, U.S. Senate, 90th Cong., 2d Sess., on S. 2906, S. 1964, S. 2690, and S. 2020 (1968) [hereinafter the Senate hearings (1968)].

of land. *Id.*[14] These bills also reflected an early consensus that accommodation of subsistence and economic development needs could be made by setting aside surface rights for subsistence and dedicating income from subsurface rights for economic development.[15]

These early bills differed in one important respect of particular concern to the Natives. The Administration proposed mandatory trust status for land conveyed to Native villages in both its early bills. *See* S. 1964, §3(e), [Senate

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[14] S. 2906, drafted by a task force including representatives of the Natives, the State, and the Department of the Interior, provided for the conveyance of 40 million acres to the villages and further authorized Native use of federal lands to "continue to use or occupy, for hunting, fishing, and trapping purposes, and for any other aboriginal land use . . ." Senate Hearings (1968) at 13. S. 1964, a bill proposed by the Administration in 1967, authorized the Secretary of the Interior to take into trust lands needed by villages "for livelihood of the community, taking into account such factors as population, economic resources of the group, traditional way of life and the nature and value of the land . . ." *Id.* at 16. S. 2690, introduced at the behest of certain Native groups, simply provided that land proved to be held under Indian title, and not claimed by a third party, would be confirmed to the villages. *Id.* at 22.

[15] *See* S. 2906, §301; Senate Hearings (1968) at 325, Statement of Alaska Attorney General Boyko, on dedication of a percentage of royalties from Outer Continental Shelf development to settlement; *Alaska Native Land Claims*, Hearing on H.R. 11213, HR. 15049, and H.R. 17129, 90th Cong., 2d Sess., (1968) [hereinafter House Hearing (1968)] at 120, on a percentage of the State's mineral royalties dedicated to settlement; *see also* S. 3586, §5(a), authorizing the conveyance of up to 50,000 acres to each village, including "(1) title to the village site or sites now occupied by such group, and (2) title to such additional lands in the vicinity of such site or sites which, in [the Secretary's] judgment, would contribute significantly to the reasonable community expansion to fulfill future economic and social requirements, taking into account such factors as population, economic resources of said group, traditional way of life of said group, and the nature and value of the land proposed to be granted," and §9, proposing to sever the subsurface rights from those lands conveyed to the villages and grant such rights to a statewide corporation with oversight for economic development of villages, Senate Hearings (1968) at 518, 520.

Hearings (1968) at 17]; S. 3586, §8, [Senate Hearings (1968) at 519]. By contrast, the Native-supported bills proposed that land be titled to the Natives directly, or to corporations chartered under the IRA or state law. *See* S. 2906, §211, [Senate Hearings at 9]. Throughout the two hearings over four days held on these bills, the Native witnesses unanimously and vigorously opposed placing their lands in mandatory trust and under control of the Bureau of Indian Affairs.[16]

The State of Alaska relies upon excerpts from these statements by Native leadership and their attorney on the early bills as support for its construction of ANCSA as terminating Indian country in Alaska. Petitioner's Br. at 29, 35. By these statements, the Native leadership bluntly indicated their desire to be free of the Bureau of Indian Affairs, but at no point did the Native leadership indicate a desire that the Natives' recognized ability to govern their own affairs – the sine qua non of the federal/tribal relationship – be terminated.[17]

To the contrary, the Native leadership argued forcefully for greater self-determination, not less in the form of limited or complete termination. *See, e.g.*, Senate Hearings (1968) at 78 (Statement of George Ondola, Chairman of the Village Council of Eklutna.) In 1968, the Alaska Natives were in the forefront of Federal Indian policy in their insistence upon self-determination. It has since become axiomatic that Indian self-determination comports with a continued United States' trust relationship with Indians. Indeed, the federal Indian

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[16] *See* Senate Hearings (1968) at 88-90 (Statement of Barry Jackson); Senate Hearings (1968) at 207, 208 (Statement of Elva Naanes, Secretary, Alaska Federation of Natives); Senate Hearings (1968) at 213, 232 (Statement of Donald Wright, President of Cook Inlet Native Association.)

[17] *See* Notice, 58 Fed. Reg. 54364, October 21, 1993, indicating that, as federally recognized Indian tribes, Alaska villages exercise the same powers of self-governance held by other recognized Indian tribes.

policy of tribal self-determination is now viewed as the highest expression of the Federal trust relationship. *See* Respondent's Br., III.

Other differences existed between the Natives and the Department of the Interior on proposed land claim settlement terms, principally on the amount of land and money to be conveyed to the Natives. *See* House Hearing (1968), H.R. 17129 (introduced at the request of the Administration) at 72; (Statement of Emil Notti, President, Alaska Federation of Natives) at 109. On one point, though, an early consensus was reached and maintained that the villages required a land base to support the traditional way of life and to provide for future economic development. Throughout its deliberations on the subject, Congress heeded President Johnson's call for a settlement that provided Alaska Natives with title to the land needed to sustain their villages.[18]

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[18] *See* Committee Report on H.R. 10367, which after compromise with the Senate became the final version of the Act: "[T]he Committee took into consideration the land needed for ordinary villages sites and village expansion, the land needed for a subsistence hunting and fishing economy by many of the Natives, and the land needed by the Natives as a form of capital for economic development;" View of the Department of the Interior on H.R.10367: "[The bill] will, on the one hand provide land that is necessary for the living and subsistence needs of those natives who continue to rely upon the land for their living, while at the same time provide an economic settlement both in terms of cash contributions and patents to land and mineral rights which we consider to be generous and equitable which will be used by the natives for promoting their economic development to the fullest extent possible." *Providing for Settlement of Land Claims of Alaska Natives*, H. Rep. No. 523, 92d Cong., 1st Sess. at 5, 23 (1971).

B. In ANCSA, Congress authorized the designation of villages of Native character and the selection of land for the benefit of those villages to be held by village corporations, effectively setting aside those lands for Alaska's Native villages.

In its overall structure and main features, the final terms of ANCSA reflected the position of the Natives. It authorized the conveyance of 44 million acres to Native corporations: up to 22 million acres in surface rights to village corporations and the remaining acres in both surface and subsurface rights for regional corporations and other special needs.[19] It provided for Native control of their resources and future through the use of village and regional corporations. It also acknowledged the Natives' desire for income from subsurface rights to support economic development of Native Alaska.[20]

In particular, Congress expressly adopted the Natives' desire for self-determination. "In sections 7 and 8 of the conference report authorizing the creation of Regional and Village Corporations, the conference committee has adopted a policy of self-determination on the part of the Alaska Native people." Conference Report at 37. In addition, Congress made plain its intent that land surrounding the villages be conveyed

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[19] The State suggests that the Ninth Circuit's judgment may result in Indian country status for the entire 44 million acres conveyed to Native corporations under the Act, which are "dispersed in a buckshot fashion throughout the State." Petitioner's Br. at 45. This is simply not the case. The Ninth Circuit focused its analysis on lands conveyed to village corporations (up to 22 million acres). This brief focuses on the same lands and, as indicated below, those lands are not spread "buckshot" throughout the state but are compact around the villages themselves. *See* Anchorage Daily News, *Indian Country: Two Destinies, One Land*, Special News Section, June 29-July 5, 1997, at 20-21, which shows the location and compact boundaries of village corporation lands. A reprint of this special news series has been lodged with this brief.

[20] *See Alaska Native Claims Settlement Act*, Conference Rep. No. 581, 92d Cong., 1st Sess., (1971), to accompany H.R.10367, [hereinafter Conference Report (1971)] at 35.

to village corporations for the support of the villages' way of life. *Id.*

The statutory and regulatory scheme set out in ANCSA was well tailored to accomplish these general purposes. Native villages, defined in the Act as "any tribe, band, clan, group, village, community, or association," had to meet two requirements to be eligible for benefits under the Act: first, the village had to have at least twenty-five residents; second, the village could not be "of a modern and urban character" with the majority of its residents non-Native. 43 U.S.C. §§1602(c), 1610(2). The lands to be withdrawn for the benefit of eligible villages were those surrounding and adjacent to the village, or other public lands "of a character similar to those on which the village is located and in order of their proximity to the center of the Native village." 43 U.S.C. §§1610(a)(3), 1613.[21]

Eligible Native villages were entitled to "receive lands and benefits under this Act," but were required to first incorporate under state law. *Id.*, §1607(a). The village corporations were the business arms of the villages, with only the Native residents of the villages entitled to incorporate and such corporations, by definition, formed to hold and manage lands and funds under the Act "on behalf of a Native village . . . " *Id.*, §§1607(a), 1602(j). The subsurface rights to these lands were transferred to the regional corporations, with the village corporations authorized to consent to the exploration or development of minerals "from the subsurface estate in the lands within the boundaries of any Native village . . . " *Id.*, §1613(f).

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[21] The total acreage to be withdrawn for the benefit of an eligible village depended upon the 1970 population of the village: 69,120 acres for villages with 25 to 99 residents; 92,160 acres for villages with 100 to 199 residents; 115,200 acres for villages with 200 to 399 residents; 138,240 acres for villages with 40 to 599 residents; and 161,280 acres for villages with 600 or more residents. 43 U.S.C. §1613(a). The patents issued to the village corporations were for surface rights, while the subsurface rights to those lands were patented to the regional corporations. *Id.*, §1613(f).

Clearly the linchpin for the land selections by village corporations and the receipt of other benefits under the Act was the determination of villages' eligibility to incorporate. The Act made an initial determination of village eligibility by setting out a list of two hundred and five (205) Native villages that were subject to the Act. *Id.*, §1610(b). The Act further authorized the Secretary of the Interior to review the list to confirm the eligibility of the listed villages, delete ineligible villages, and add unlisted but eligible villages. *Id.*

On May 30, 1973, the Secretary adopted regulations to implement ANCSA that set out a regulatory process for Alaska Native land selections. *See* 38 Fed. Reg. 14218 (1973), codified at 43 C.F.R. §2651 (1996). These regulations established procedures for determining the eligibility of villages to incorporate as well as the lands selected by incorporated villages. Substantively, these administrative processes are virtually identical to the inquiry undertaken by courts to determine the existence of Indian country under 18 U.S.C. §1151(b).

The regulations established an informal adjudicatory process to determine village eligibility. The Juneau Area Office of the Bureau of Indian Affairs was directed to investigate and examine records and evidence "bearing on the character of the village and its eligibility . . . " 43 C.F.R. §2651.2(a)(1) (1996). Findings of fact and a proposed determination on each village were to be published locally and in the Federal Register. In the case of a protest (against either a proposed determination of eligibility or ineligibility), the matter would be referred to an ad hoc board appointed by the Secretary and composed of members "familiar with Native village life." *Id.*, §2651(a)(5). Either the board (in the event of an appeal) or the Bureau of Indian Affairs issued a "certificate of eligibility" to those villages that demonstrated the required criteria. *Id.*

The criteria for village eligibility varied somewhat, depending upon whether the village was listed in §§1610 and

1615 of the Act.[22] The regulations presumed that the 205 listed villages in §1610 were majority Native. These villages were required to demonstrate the minimum number of residents, "an identifiable physical location evidenced by occupancy consistent with the Natives' own cultural patterns and life style," and that they were not modern and urban in character. 43 C.F.R. §2651.2(10)(b)(3) (1996). In addition to these criteria, unlisted villages were also required to demonstrate that a majority of residents were Native. *Id.*, §2651.2(b)(4).

Once determined to be eligible, a village was required to incorporate. The corporation then selected its maximum surface acreage entitlement under the Act. *Id.*, §2651.4(b). The regulations required that the village corporation select first, the township(s) encompassing the village, and second, additional acreage as necessary. The selections were required to be contiguous where possible and reasonably compact. Further, the regulations provided that land selections would not be considered reasonably compact if the selection excluded lands available for selection outside the exterior boundaries of those selected, or if lands "similar in character to the village site or lands ordinarily used by the village inhabitants are disregarded in the selection process . . . " *Id.* §2651.4(b)(2).

This process resulted in a list of villages, certified as Native in character by the Department of the Interior, and eligible thereby to incorporate and select public lands for their benefit largely out of their former aboriginal territory. *See* Final Eligibility of Native Villages, 38 Fed. Reg. 26217,

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[22] Section 1615 listed the Tlingit-Haida villages separately. Special provisions were made for these villages, inasmuch as Congress had authorized and the Indians had successfully prosecuted a case against the United States for a partial taking of their aboriginal lands. *See Tlingit & Haida v. U.S.*, 389 F.2d 778 (Ct.Cl. 1968). The other villages were not the subject of any litigation regarding their aboriginal rights.

September 19, 1973.[23] Under every permutation of the governing standard, this process effectively determined that the eligible villages and the territory transferred for their benefit to village corporations constituted dependent Indian communities, at least as of that date.[24] *See Narragansett Indian Tribe of Rhode Island v. Narragansett Elec. Co.*, 89 F.3d 908 (1st Cir. 1996); *Pittsburg & Midway Coal Co. v. Watchman*, 52 F.3d 1531 (10th Cir. 1995); *United States v. South Dakota*, 665 F.2d 837 (8th Cir.), *cert. denied*, 459 U.S. 823 (1982), all enumerating factors relevant in determining the existence of a dependent Indian community.[25]

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[23] This list certified 170 villages out of the 205 listed in §1610 of the Act. Other villages were added in the following months, after the Department investigated applications from villages that were not listed in the Act.

[24] The entire 22 million acres transferred to village corporations for the benefit of villages may or may not constitute Indian country. Those parcels that encompassed or were adjacent to the villages were plainly set aside for the support of the village and, as such, constituted Indian country under §1151(b). However, in some cases, non-contiguous parcels were conveyed to village corporations to meet the village's acreage entitlement under the Act. Whether these non-contiguous parcels also constituted Indian country would depend upon the circumstances in each case.

[25] These decisions list in toto the following factors as relevant: whether the U.S. retains title to or has otherwise permitted the Indians to occupy the land; the nature of the area in question; the relationship of the inhabitants to the U.S.; whether the inhabitants exhibit cohesiveness in economic and other pursuits; the established practice of the federal government toward the area; the extent to which the area was set aside for the use, occupancy and protection of dependent Indian peoples. These factors have been distilled into two basic inquiries: whether the Indians in question are subject to federal superintendence; and whether the area in question was set aside under federal law for the use, occupancy, and protection of those Indians. *State of Alaska v. Venetie*, 101 F.3d at 1291-1292.

C. None of the Act's provisions, either singly or cumulatively, had the effect argued by the State of Alaska of extinguishing all forms of Indian country in Alaska.

The State of Alaska argues against Amici's construction of the Act by citing the land tenure established for the selected lands, the rejection of reservation status for those lands, the required transfer of certain lands and facilities to municipal corporations, and the underlying suggestion that at some point in the future the Natives would be completely absorbed into non-Native society. Petitioner's Br. at 34-39. None of these provisions or assumptions, however, is inconsistent with the construction proposed here.

This Court has time and again rejected the proposition that a general belief that a statutory regime would result in the abolition of Indian country is sufficient evidence of Congress' intent to terminate Indian country. In construing the General Allotment Act (or Dawes Act) and surplus lands acts,[26] this Court has refused to extrapolate a specific congressional intent to abolish a reservation from a general expectation regarding the eventual demise of the reservation. *Solem v. Bartlett*, 465 U.S. at 468, and cases cited therein. Congress' general expectation that the Native villages may fall by the wayside as a consequence of ANCSA (even assuming Congress expected such), then, will not alone support a terminationist construction of the Act.

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[26] These acts, unlike ANCSA, were explicitly terminationist in their goals and specific provisions. *See* Act of February 8, 1887, 24 Stat. 388, codified at 25 U.S.C. §334. The original Dawes Act provided for the breaking up of reservations into individual Indian allotments and provided for a twenty-five year trust period for allotments, during which time the allotments would be inalienable. *Id.*, §§1, 5. If these provisions of the explicitly terminationist General Allotment Act did not extinguish Indian country, a land claim settlement intended to foster greater self-determination should not be so construed.

Neither do the specific provisions of ANCSA cited by the State demonstrate a plain congressional intent to extinguish Indian country. Certainly the substitution of fee patented land for aboriginal title cannot support a termination of Indian country. This is simply a change in land tenure and does not signify a lesser dedication of the land so held to the support of dependent Indians. *See United States v. Sandoval, supra.*[27] Neither should the conveyance of the withdrawn lands to village corporations, rather than the villages themselves, dictate a contrary result. These corporations were the villages incorporated, maximizing development possibilities for the land through the corporate structure "for and on behalf of a Native village". 43 U.S.C. §1602(j). Certainly, a mechanism chosen by the villages in the name of self-determination should not be construed as a back-handed extinguishment of governing authority previously enjoyed by the villages over their territory.[28]

Finally, the requirement that certain lands within the villages be conveyed to municipal corporations [43 U.S.C. §1613(c)(3)] does not reflect an intent to extinguish all forms

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[27] Petitioner argues that a dependent Indian community, with its land held by fee patent, is the jurisdictional equivalent of an Indian reservation. Petitioner's Br. at 30-31. The jurisdictional consequences under §1151 may be the same, but the extent of regulatory powers held by the Bureau of Indian Affairs for the two are not the same. The Alaska Native leadership objected to Bureau control over their land, not the jurisdictional consequences of Indian country. *See* discussion *supra*.

[28] As noted above, the village corporations when incorporated were the same as the villages themselves. It is theoretically possible that as time passes and due to certain circumstances, the tie between the village and the village corporation may become attenuated. In that event, that village's connection to the lands selected for its benefit by the village corporation would be loosened and, hence, that village's present claim for dependent Indian community status weakened. As a general proposition, though, this has not occurred in village Alaska. Most villages remain closely connected to the lands withdrawn for their benefit under the Act. *See* discussion *infra*.

of Indian country. As noted above, state municipal corporations have been present in many of the Native villages for decades. In ANCSA, Congress provided for the separation of municipal functions from tribal functions, but the separate existence of local, municipal governments does not vitiate the continued functioning of tribal governments in the same boundaries. *See*, *Seymour v. Superintendent*, 368 U.S. 351, 358 (1962), where the Court held that an analogous town site provision in a surplus lands act did not reflect an intent to diminish Indian country.

The only real question raised by the State's arguments regarding the provisions of ANCSA is whether, as a result of the combined effect of these provisions, the villages have lost their Native character and their connection to the lands withdrawn for their benefit. Whether such has occurred at any given village is a matter to be determined by a trial court when, and if, the question is appropriately presented. As a general proposition, though, Alaska's villages have maintained their Native character and their close connection to the lands set aside by Congress for their benefit.

III. Today, the Native villages of Alaska remain Indian country in fact.

Most of the Alaska villages or tribes currently recognized by the United States were certified as eligible to incorporate and select lands under ANCSA.[29] And the overwhelming

[29] The United States currently recognizes 226 Alaska Native villages or tribes as self-governing entities. Notice, 61 Fed. Reg. 58211, November 13, 1996. According to research of the Alaska State Legislature, Congress expended approximately $496.5 million between the Bureau of Indian Affairs and the Indian Health Service in the provision of federal Indian services to Alaska's federally recognized tribes in fiscal year 1997. *See* Memorandum, dated May 29, 1997, addressed to Senator Al Adams, from Division of Legal & Research Services, Legislative Affairs Agency, Alaska State Legislature. Interestingly, while federal expenditures for Natives have remained stable, the number of Bureau of Indian Affairs personnel has

majority of those villages or tribes that received "set aside" lands under the Act remain today Native in character and, for all practical purposes, the only functioning governments in their territories.

According to the 1990 decennial census, roughly one half of Alaska's Native villages are 90% Native and over two-thirds are 75% Native. 1990 Census Report at 22-24. Except for those Natives born after ANCSA, the village residents are generally the same people who are shareholders of the village corporations. This is as a result of the original twenty year restriction in the Act against alienation of shares and the 1988 amendment to the Act which extends indefinitely that restriction against alienation, subject to corporation shareholders' decision to lift such. *See* Act of February 3, 1988, 101 Stat. 1788, codified at 43 U.S.C. §§1606(h), 1629b, and 1629d.[30] Obviously, these same villagers also control any municipal government located in their territory.

Because the same Native village residents generally control the village or tribe and the village corporation, there is in most regions a high level of cooperation between the two. In a few cases, the village corporations have actually transferred the land held by them for the village to the village or tribe itself. *See Indian Country* at 9 (June 30, 1997), describing the transfer of land from the Kipnuk Village Corporation to the traditional Yu'pik government for the Kipnuk Village. Whether the "set aside" lands are held by the village corporation or the village, the Natives continue their traditional subsistence activities on the set aside lands. *See Indian Country* at 3 (June 29, 1997), regarding subsistence activities at

declined from over 1,000 two decades ago to fewer than 100 today, as a result of the villages' assumption of Bureau administrative functions. *Indian Country* at 10 (June 30, 1997).

[30] The 1988 amendments also authorized ANCSA corporations to issue shares to children born after 1971. 43 U.S.C. §1606(h). Several regional corporations, including Nana Regional Corporation, a member of Amicus AFN, have done so.

Venetie; *id.* at 6 (June 29, 1997), regarding Quinhagak; *id.* at 10 (June 30, 1997), regarding Akiachak; and *id.* at 17 (July 2, 1997), regarding Kipnuk.[31]

Similarly, the Native villages generally have a cooperative relationship with local municipalities, where municipalities exist. Only 34 new municipalities have been incorporated since ANCSA and less than half of the villages have completed the conveyances to municipalities required by §1613(c)(3) of the Act. Indeed, seven municipal corporations have been dissolved since ANCSA. *See* Report of Department of Community and Regional Affairs on ANCSA 14(c)(3) Progress, State of Alaska, dated September 9, 1997. Clearly, ANCSA has not fostered a rush toward the substitution of municipal governments for tribal governments. To the contrary, tribal and municipal governments work together, with the tribes assuming more and more local government responsibilities over the last twenty years, from law enforcement to water and sewer. *Indian Country* at 10 (June 30, 1997). In one case, for example, the municipality simply contracts with the tribe for the delivery of all services. *Id.* at 9 (June 30, 1997),

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[31] In some cases, the administrative and financial burden of the village corporations has proven to be too much for the villages to bear. Within Nana Regional Corporation, a member of Amicus AFN, for example, ten of the eleven village corporations in the region have merged with the regional corporation, citing the need to conserve administrative resources. In the merger, the regional corporation acquired the surface rights to land held by the village corporations for the benefit of the villages. However, tribal IRA councils must consent to the exploration or development of subsurface rights to land adjacent to the villages, a right previously held by the village corporations. As a result, the tribes in the Nana Regional Corporation have maintained the same connection to the land adjacent to their villages as those villages with active village corporations.

discussing arrangement between Village of Quinhagak and Amicus City of Quinhagak.[32]

As the most active local governments, tribes engage in a range of activities in their territories. Such activities include Indian child custody proceedings, village environmental protection initiatives, land use regulation and natural resource protection, construction and improvement of local roads, construction of public works and a whole range of mundane matters appropriate to local government. *See, e.g., Indian Country* at 5-8 (June 29, 1997), on Village of Quinhagak's resource management and regulation of fishing in Kanektok River with State cooperation; *id.* at 24-25 (July 4, 1997), on Kwethluk's caribou management program undertaken in cooperation with State and Federal officials; *id.* at 22 (July 3, 1997), on tribal regulation of alcohol in Indian country.[33]

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[32] *See also*, Ordinance 89-13, of Amicus Northwest Arctic Borough, which expressly recognizes the governmental status of the eleven villages located within its borders and directs borough cooperation with such villages in the exercise of the boroughs' powers or performance of its duties as a state chartered local government.

[33] As this Court has noted, tribal sovereignty includes a territorial component. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n.18 ("Our cases have recognized that tribal sovereignty contains a 'significant geographical component' "). The Secretary of the Interior and Secretary of the Treasury have implicitly acknowledged that the inherent governmental authority of at least one Native village, the Village of Barrow (a member of Amicus AFN), has a significant territorial component. Under the Indian Tribal Governmental Tax Status Act, 26 U.S.C. §§7701(a)(40), 7871, Departments of the Interior and Treasury were authorized to determine which tribal governments exercised governmental functions which, according to Treasury's regulations under the act, included clearly territorial based powers such as the power to tax, the power of eminent domain, and police power. IRS Cumulative Bulletin 1984-1, pg. 513. In consultation with Interior, Treasury certified the Village of Barrow as exercising such inherent power. IRS Cumulative Bulletin 1983-2 at 606, 611.

Most importantly and notwithstanding the State's protestations to the contrary, the villages continue to perform most law enforcement functions in village Alaska. "Most law enforcement officials agree that the long arm of the [state] law doesn't reach very effectively into the bush." *Indian Country* at 18 (July 3, 1997). Except for the most serious felonies, the State's law enforcement role in Native villages is very limited. There are simply no State police officers, no prosecutors and no State courts in the Native villages, except for a few regional centers like Nome, Bethel, and Barrow.[34]

The State is perfectly aware of this reality on the ground. Countless State officials, including judges, magistrates, troopers, prosecutors, correction officers, assistant attorneys general, youth counselors and welfare case workers, have entered into agreements with, transferred cases to, encouraged and supported the governance and peace keeping efforts of Native tribes. The State's cooperation in aiding Native governance is not just common knowledge; it has been documented

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[34] John E. Angell, *Public Safety and the Justice System in Alaska Native Villages*, January 1981, "Slightly over half of the rural villages in Alaska have a part-time person who is considered the police department. There are no other representatives of the "justice" system in most communities except during an emergency or the existence of a special problem. A few have a makeshift cell that can be used for the temporary detention of dangerous, disorderly, suicidal or drunk prisoners. Otherwise such people are handcuffed or taped to secure objects such as beds or posts until they calm down or assistance – usually from a State Trooper living in a faraway community – is obtained" at 3; "In most villages when a life-threatening emergency occurs, it is not uncommon to spend hours, and on occasion days, attempting to get a request for assistance to a law enforcement official outside the community" at 28; "[T]he justice system in the rural Native communities of the State is understaffed, inadequately funded and nearly invisible" at 63. For the Court's convenience, a copy of the Angell article has been lodged by Amici with this brief.

since territorial days in books, articles, law reviews, news stories, and the State's own official reports.[35]

Similarly, the State's failure to provide law enforcement or keep the peace in rural Alaska is equally well documented. *See* n.34, *supra*. In short, contrary to the State's contention, the decision below does not reverse but affirms the basic jurisdictional premise upon which both the State and tribes have operated since statehood.

IV. For Alaska and its non-Native residents, the consequences of Indian country in Alaska are neither dramatic nor disruptive.

The demographic facts of life in Alaska restrict the impact of the Ninth Circuit's decision largely to the Natives themselves. Just as the Native villages are overwhelmingly Native, the overwhelming majority of non-Natives live well outside Indian country. More than ninety (90) percent of the Alaska's non-Native population lives within the urban areas of Anchorage, Fairbanks, Juneau, Ketchikan, Kenai, Mat-Su and Sitka Boroughs or the predominantly non-Native villages and regional centers, none of which would constitute Indian country under the Ninth Circuit's judgment. *See* 1990 Census of Population and Housing, U.S. Dep't of Commerce, 1990 at 20-26. Those few non-Natives who do reside in the Native villages are there by choice, not as a result of federal policy encouraging non-Native settlement there; these non-Natives have generally entered into consensual relations with the

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[35] Arthur Hippler and Stephen Conn, *The Village Council and its Offspring: A Reform for Bush Justice*, 5 UCLA-Alaska L. R. (1975) at 39 ("United States Commissioners, territorial and State judges and prosecutors, and State and Federal Alaska Native Service personnel provided support and implicit or even explicit endorsement of Council justice") at 40, 41, 42, 43; Angell, *supra* at 18, 95-111; *Indian Country* at 18 (July 3, 1997). For the Court's convenience, Amici have lodged a copy of the Hippler and Conn article with this brief.

Natives and have consented thereby to tribal jurisdiction. *See Montana v. United States*, 450 U.S. 544 (1981).

Neither does the Ninth Circuit's judgment undermine significant State interests in Indian country as argued by the State. The Ninth Circuit's judgment confirms tribal authority over Venetie; it does not address the extent of State authority over Venetie. Congress has already granted the State civil and criminal jurisdiction over Indian country in Alaska, giving the State concurrent authority in that regard with the tribes. *See* 72 Stat. 545, Act of August 8, 1958; *see generally, Handbook of Federal Indian Law* at 344-346. And the extent of the State's regulatory authority will depend, as its does throughout Indian country, upon a particularized inquiry into the State's interests: an analysis that plainly takes into account significant state interests. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). Finally, the State's concerns regarding fish and game management and tax revenues from Venetie have already been addressed by this Court and Congress.[36]

The State's concerns regarding Indian country in Alaska are flights of fancy that bear little relation to reality in Alaska. If anything, the administration of Indian country in Alaska is simpler than elsewhere, given the absence of checkerboarding in the compact village territories. *See Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976).

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[36] Regarding fish and game management, no treaty rights to fish and hunt exist in Alaska (which rights were the subject of the *New Mexico v. Mescalero Apache Tribe, supra*, decision cited by the State) and aboriginal hunting and fishing rights were extinguished by Congress in ANCSA. 43 U.S.C. §1603. *See* Petitioner's Br., n.34. In addition, the Court had made clear that Indian fishing and hunting rights may be regulated by the State if reasonable and necessary for conservation purposes. *Department of Game v. Puyallup Tribe*, 414 U.S. 44 (1973). Finally, Congress has already expressly exempted undeveloped land held by village and regional corporations from state taxation. 43 U.S.C. §1620(d).

Conclusion

With Indian country status, the Natives are able to govern largely their own people and their own territory. Without Indian country status, the Natives will be left largely with no local government at all. Most Native villages today remain outside an organized borough and more than one hundred Native villages have no municipal corporation at all. Under these circumstances, Indian country status is not only appropriate, it is necessary for the administration of any justice in Native Alaska.

Respectfully submitted,

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Supreme Court of the United States
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STATE OF ALASKA,
Petitioner,

v.

NATIVE VILLAGE OF VENETIE
TRIBAL GOVERNMENT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE ON BEHALF OF THE METLAKATLA INDIAN COMMUNITY IN SUPPORT OF RESPONDENTS

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BRIEF AMICUS CURIAE ON BEHALF OF THE METLAKATLA INDIAN COMMUNITY IN SUPPORT OF RESPONDENTS

Pursuant to Rule 37, the Metlakatla Indian Community submits this brief amicus curiae because it has a significant interest in responding to assertions made by Petitioner and Amici regarding the status of the Community's reservation.[1]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for Metlakatla Indian Community states that those attorneys listed on this brief authored the brief in whole. No other person or entity, or other than the amicus curiae made a monetary contribution to the preparation or submission of this brief. Letters of consent as required by Supreme Court Rule 37.3 are appropriately filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

Amicus Metlakatla Indian Community, a federally-recognized tribe ("the Community") submits this brief to correct significant misstatements and unsupported assertions regarding the status of the Annette Islands Reserve as "Indian country" under federal law, by Petitioner, State of Alaska, and Amici, Alaska Fish & Wildlife Federation and Outdoor Council, Inc., and Alaska Fish and Wildlife Conservation Fund, Inc., all of whom have asserted that the Reserve is not Indian country and further imply that the State of Alaska has jurisdiction over fishing within the Reserve. These statements are not supported by the law and this Court should not come to any such conclusions regarding the Indian country status of the only remaining federally established reservation in Alaska. In fact, if this Court addresses Metlakatla, it should be to acknowledge its status as a federal Indian reservation and as Indian country under 18 U.S.C. § 1151(a) (1988).

SUMMARY OF ARGUMENT

The Annette Islands Reserve has been recognized by Congress, the Executive Branch and the Judiciary as the reservation of the Metlakatla Indian Community. The Reserve was set aside by statute. As such it constitutes Indian country under 18 U.S.C. § 1151(a).

ARGUMENT

I. CONGRESS HAS REPEATEDLY DESIGNATED AND RECOGNIZED THE ANNETTE ISLAND RESERVE AS AN INDIAN RESERVATION AND INDIAN COUNTRY.

Amicus Metlakatla Indian Community is a federally recognized tribe exercising jurisdiction over the Annette Islands Reserve in Southeast Alaska. The Tribe governs itself under a Constitution and Bylaws approved on August 23, 1944, by the Secretary of the Interior pursuant to section 16 of the Indian Reorganization Act. 25

U.S.C. § 476 (1970). The Community's tribal sovereign status has been recognized and confirmed by Congress, the Executive Branch, and the Judiciary.[2]

The Annette Islands Reserve was established by Congress for "the use of the Metlakatla Indians, and those people known as the Metlakatlans who, on March 3, 1891, had recently emigrated from British Columbia to Alaska, and such other Alaska Natives as may join them." Act of March 3, 1891, 26 Stat. 1101, 25 U.S.C. § 495.[3] This is the only currently existing federal Indian reservation within the State of Alaska, its reservation status being expressly preserved by section 19 of the Alaska Native Claims Settlement Act ("ANCSA"). 43 U.S.C. § 1618 (1986).[4]

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[2] For Congressional recognition *see, e.g.*, 25 U.S.C. §§ 450-450n (1975), 25 U.S.C. § 495 (1891). For executive recognition *see* 25 U.S.C. § 476 (1970); 25 C.F.R. §§ 81.1-81.24 (1990). For judicial recognition *see Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918); *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962). *See also Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977).

[3] In *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918), this Court described the reasons for the establishment of Annette Islands Reserve:

> "The purpose of creating the reservation was to encourage, assist, and protect the Indians in their effort to train themselves to habits of industry, become self-sustaining, and advance to the ways of civilized life."

[4] The Community was excluded from the benefits of the Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 19(a), 85 Stat. 688, 710 (1971) (current version at 43 U.S.C. § 1618(a) (1982)), which states:

> "Notwithstanding any other provision of law, and except where inconsistent with the provisions of this chapter, the various reserves set aside by legislation or by Executive or Secretarial Order for Native use or for administration of Native affairs, including those created under section 497 of Title 25, are hereby revoked subject to any valid existing rights of non-Natives. *This section shall not apply to the Annette Islands Reserve established by section 495 of Title 25 and no person enrolled in*

Metlakatla's reservation and Indian country status has been expressly recognized by Congress and this court. The 1891 Act states that the lands are "set apart as a reservation for the use of the Metlakatla Indians" and, in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 87 (1918), this Court specifically concluded that this Act created a federal Indian reservation.

In 1934, Congress enacted a law granting citizenship to the Indians of Metlakatla. In so doing, Congress reaffirmed the 1891 reservation and federal supervision over it.

> "The granting of citizenship to the said Indians shall not in any manner affect the rights, individual or collective, of the said Indians to any property, nor shall it affect the rights of the United States Government to supervise and administer the affairs of the said Metlakahtla Colony. And any reservations heretofore made by any Act of Congress or Executive order or proclamation for the benefit of the said Indians shall continue in full force and effect and shall continue to be subject to modification, alteration, or repeal by the Congress or the President, respectively."

Act of May 7, 1934, 48 Stat. 667.

In 1958, Congress extended Pub. L. 280 criminal and civil jurisdiction to all Indian country in Alaska thereby transferring jurisdiction from the Federal government to the State. 18 U.S.C. § 1162(a) as amended, Pub. L. 85-615, 72 Stat. 545 (1958).[5] In 1970, Congress enacted

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the Metlakatla Indian Community of the Annette Island Reserve shall be eligible for benefits under this chapter." (Emphasis added).

[5] The purpose of Pub. L. 280 is to delegate existing federal jurisdiction within Indian country to certain states. By definition, the existence of Indian country is a prerequisite to the exercise of state jurisdiction under this law. *See* F. Cohen, Handbook of Federal Indian Law 361 (1982 ed.).

an amendment to 18 U.S.C. § 1162 specifically addressing jurisdiction on Metlakatla. The purpose of the legislation was to restore to the tribe concurrent criminal jurisdiction over minor offenses that it had exercised prior to transfer of jurisdiction to the State. H.R. Rep. No. 1545, 91st Cong., 2d Sess. (1970) *reprinted in* 1970 U.S. Code Cong. and Admin. News, 4783, 4784.

In enacting the bill, the House Report described the state of jurisdiction on Metlakatla. It gives strong factual support that the Reserve constitutes Indian country.

> "The Metlakatla Indian Community was established in 1887 by a group of Indians under the leadership of a missionary, Father Duncan. Father Duncan and his group had come to Alaska at the invitation of President Cleveland and had been assured that such areas as they might choose for themselves would be set aside for their use and occupancy. The Indians chose the Annette Islands in Southeast Alaska and under the act of March 3, 1891, 26 Stat. 101, 48 United States Code section 358, the Annette Islands were 'set apart as a reservation for the use of the Metlakatla Indians * * * and such other Alaskan natives as may join them.' This law had the legal effect of creating on the Annette Islands an Indian reservation similar to the reservations in other States of the Union."

H.R. Rep. No. 1545, 91st Cong., 2d Sess. (1970) *reprinted in* 1970 U.S. Code Cong. & Admin. News, 4783, 4784.

Congress further noted that Metlakatla had historically been a tribal government exercising jurisdiction over its territory.

> "The Metlakatlans created a model community and a model government on the Annette Islands. They set up rules for the election of a mayor and council. They arranged for their own community to furnish governmental services, including education. They

laid out their streets and planned systematically for the growth of their town. They also enforced law and order as far as misdemeanor offenses were concerned. Major offenses were the responsibility of the Federal Government.

"In 1934 Congress, by enacting the Indian Reorganization Act, 48 Stat. 984, 25 United States Code section 476, provided a system by which Indian tribes could organize themselves and could have their organization recognized under Federal law. Pursuant to that law the Metlakatla Indian Community adopted a constitution and bylaws which codified its preexisting governmental structure. The constitution and bylaws were approved by the Department of the Interior on August 23, 1944, and therefore brought Metlakatla's well-established system of government within the framework of the Indian Reorganization Act. The Indian community had jurisdiction over minor criminal offenses under its federally recognized government. However, when the act of August 8, 1958 was passed giving Alaska jurisdiction over offenses by or against Indians in all Indian country within the Territory of Alaska, it had the effect of eliminating the legal basis for the jurisdiction exercised by the community over minor offenses. As Commissioner Bruce stated at the hearing, enactment of the bill would reinvest the Metlakatla Community Council with local legislative authority and police powers to enforce its laws over minor criminal offenses in the Indian community would remain exclusively with the State."

Id.

Thus, at the time this law was enacted, Congress acknowledged that Metlakatla was a federal Indian reservation "similar to the reservations in other States of the Union" and that "major offenses on the reservation were the responsibility of the Federal government [under the Major Crimes Act, 18 U.S.C. §§ 1151 and 1152]." It also acknowledged that Metlakatla, not the State, had jurisdiction over minor criminal offenses.

Indeed, if Metlakatla was not an Indian reservation included within the statutory definition of Indian country, the original transfer of jurisdiction to the State would have been superfluous and there would have been no need for the federal government to restore criminal jurisdiction to the tribe by the amendment. Thus, Congress has repeatedly stated and reaffirmed Metlakatla's status as a reservation and Indian country.

II. THE EXECUTIVE BRANCH HAS REPEATEDLY TREATED THE ANNETTE ISLANDS RESERVE AS A STATUTORY INDIAN RESERVATION SATISFYING THE DEFINITION OF "INDIAN COUNTRY."

The Executive Branch has also repeatedly recognized the Reserve, both land and surrounding waters, as Indian country over which the United States and the Metlakatla Indian Community have jurisdiction.

On April 28, 1916, two years prior to this Court's decision in *Alaska Pacific Fisheries, supra,* the President of the United States issued a Presidential Proclamation (Proc. 1332) entitled "Annette Island Fishery Reserve," 39 Stat. 1777, stating that waters within three thousand feet from the shore lines at mean low tide of Annette and certain adjacent islands were reserved for the use of the Metlakatla Indians. This Proclamation recited and relied upon the fact that the Annette Islands had, by the 1891 legislation, been "set apart as a reservation for the use of the Metlakatla Indians . . . to be held and used by them in common, under such rules and regulations and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior."

On January 28, 1915, the Secretary of the Interior, pursuant to the 1891 statute, issued regulations for the local government of the Reserve under which substantial governmental authority was exercised by the Community. (Formerly 25 C.F.R. 1.1—1.68).

On August 24, 1944, the Community adopted a Constitution and Bylaws at an election called and held by the Secretary of the Interior under the Indian Reorganization Act, 25 U.S.C. § 476. *See* House Report quoted above at p. 5. Under the Constitution and Bylaws, approved by the Secretary of the Interior and adopted by the Community, the Community has jurisdiction over the Reserve, its Council has the authority to pass ordinances for the local government of the Community and it has established courts to exercise the civil, criminal and appellate jurisdiction of the Community within the lands and waters of the Annette Islands Reserve.

Although this Court held in *Alaska Pacific Fisheries, supra,* that the reservation included the Annette Islands and the surrounding and intervening waters, the maritime boundary had not been officially surveyed until recently. On September 26, 1995, the Secretary of the Interior approved a cadastral survey of the maritime boundaries of the Annette Islands Reserve performed pursuant to the Secretary's authority under 25 U.S.C. § 176 to survey the boundaries of Indian and other reservations.

The Secretary issued regulations governing the waters of the Annette Islands Reserve. *See e.g.* 28 Fed. Reg. 7183 (July 12, 1963). In the absence of a survey of the maritime boundaries of the Reserve, the Secretary's regulations applied to the waters covered by a Presidential Proclamation of April 28, 1916, 39 Stat. 1777. Following the Secretary's approval of the boundary survey, the Metlakatla Indians have exercised their exclusive fishery rights within these boundaries, as provided in the regulations of the Secretary.

The regulations reiterate the Presidential Proclamation's designation of the reservation waters as an exclusive fishery for the Metlakatla Indians and permit commercial fishing, including fishing with traps (as permitted by the decision in *Metlakatla v. Egan,* 369 U.S. 48 (1962)).

The regulations provide for enforcement by any duly authorized representative of the Secretary of the Interior. *See* 25 C.F.R. Part 241 (1997).

The Solicitor of the Department of the Interior has also issued several opinions regarding the status of Metlakatla. In 1937, the Solicitor concluded that federal laws governing the introduction of liquor into Indian country would apply to Metlakatla because it is an Indian reservation. Solicitor's Opinion M-29147, 56 I.D. 137 (May 6, 1937).

In 1943, the Solicitor considered whether Metlakatla was subject to a territorial school tax. The Solicitor concluded that Metlakatla was a tribe living on "a reservation under Federal jurisdiction" and as such was exempt from the tax. Opinion dated Feb. 24, 1943, *reprinted in* Opinions of the Solicitor of the Dept. of the Interior, 1917-1971, Vol. II, p. 1196.

In 1956, the Solicitor considered whether a federal school building and underlying land located in Metlakatla could be transferred to the Community under a federal statute permitting the transfer of public domain lands. The Solicitor held the Transfer Act did not apply to Metlakatla because the lands upon which the school rested were not public domain lands but a federal Indian reservation. Opinion dated January 11, 1956, *id.* at 1701.

In 1963, the Solicitor addressed the applicability of the Leasing Act of May 11, 1938 to the Reserve. The Act applied to land "under Federal jurisdiction." The Solicitor concluded as to the 1891 Act setting aside the reservation that "it would be hard to envisage any clearer description of an Indian reservation" and that the lands comprised a reservation subject to mineral leasing. Solicitor Opinion M-36658, 70 I.D. 363 (July 19, 1963).

All of these actions and opinions express a clear view that the Annette Islands Reserve is a federal Indian reservation and is, as such, Indian country subject to the

federal laws applicable to Indian country (including P.L. 280). The Executive Branch has clearly indicated its understanding that the Reserve is a statutory Indian reservation under the jurisdiction of the United States and constitutes "Indian country" for jurisdictional purposes.

III. THE STATE AND AMICI ASSERTIONS THAT METLAKATLA IS NOT INDIAN COUNTRY ARE ERRONEOUS.

At p. 6 of its brief, Petitioner State of Alaska asserts that Indian country does not exist in Alaska. For support it cites *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 51-52 (1962). Amici Alaska Fish and Wildlife Federation and Outdoor Council, Inc., and Alaska Fish and Wildlife Conservation Fund, Inc., make a similar assertion at pp. 5, 22 of their brief. In both instances the parties assert that "this court" has so held.

Metlakatla v. Egan concerned the right of the Community to operate fish traps which were prohibited by State law. The Secretary of the Interior promulgated regulations permitting fish traps applicable to the Reserve. At issue was the Secretary's authority to do so. The Court held the regulations would be valid if promulgated pursuant to the 1891 Act, and the Community could operate free of State law. 369 U.S. at 59.

An examination of this Court's decision in *Egan*, particularly the phrase quoted by the State and Amici, shows that this quote was taken out of context. The Court was describing the State's position. At p. 51, the Court says "the state tells us," and goes on to describe the State's position, including a specific reference to a holding by an Alaskan federal district court in *United States v. Booth*, 161 F. Supp. 269 (D. Alaska 1958) that the Metlakatla Reserve was not Indian country.[6] This Court

[6] *Booth* was a criminal prosecution under the laws of the Territory of Alaska in the Federal District Court for Alaska. The defendant pled guilty to driving under the influence of intoxicating liquor under territorial law. The court discussed the question of jurisdiction and the "Indian country" status of the Annette Islands Reserve although the defendant did not contest the court's jurisdiction or the application of the territorial laws to the Reserve. The court concluded that the Annette Islands Reserve was not "an Indian reservation in the traditional sense" because among other reasons, "the entire population of Metlakatla could move to Ketchikan, even against the will of the Alaska Native Service and the Department of the Interior" and because "Metlakatla could conceivably become a community predominantly Eskimo and Aleut. There is nothing in the Indian country statute that expresses an intent to govern Eskimos and Aleuts or groups containing Eskimos or Aleuts, or, for that matter, Alaska Natives generally or immigrant Indian communities." The court also states that Metlakatla "has no tribal organization" although at the time of the decision (1958), as at present, the Community governed itself under a Constitution and Bylaws approved by the Secretary of the Interior under the Federal Indian Reorganization Act. 25 U.S.C. § 476. The discussion and conclusion in *Booth* that the Annette Islands Reserve is not an Indian reservation and, therefore, not Indian country, is clearly inconsistent with the relevant statutory provisions and caselaw and relies on irrelevant reasons to conclude that the Reserve is not Indian country. In fact it has been said that *Booth* is contrary to several Supreme Court precedents and that its reasoning is extremely doubtful. *See* Cohen, *Handbook of Federal Indian Law*, p. 765, n.228 and p. 345, n.139 (1982 ed.).

did not hold that the Reserve is not Indian country. It merely documented a lower court finding. So the assertion that this Court made a holding is simply wrong.

Moreover, the finding in *Booth* has never been repeated, and it is flatly wrong since it fails to recognize the significance of the fact that, when Congress established the Annette Islands Reserve, it expressly stated the Islands were to be "set apart as a reservation." *See* 25 U.S.C. § 495. In his 1963 opinion, the Interior Solicitor expressly disagreed with *Booth* when he held Metlakatla was an Indian reservation. *See* Solicitor's Opinion M-36658, 70 I.D. 363, n.8. Further, *Booth* fails to take account of the Congressional affirmations of reservation status, as described above, and the decision was made prior to the

enactment of the 1958 amendment to Pub. L. 280 providing for State jurisdiction in Indian country in Alaska, as well as to the Metlakatla-specific amendment in 1970, which specifically refers to the Annette Islands Reserve as Indian country. *Booth* also is inconsistent with all of the Executive Branch interpretations and assertions of federal jurisdiction over the Reserve, noted above.

There can be no doubt that the Reserve fits squarely within the definition of Indian country in 18 U.S.C. § 1151(a) as "land within the limits of any Indian reservation under the jurisdiction of the United States Government."

IV. AMICI ASSERTIONS THAT THE STATE HAS COMPLETE JURISDICTION OVER FISHING IN THE RESERVE IS ERRONEOUS.

Amici also assert that this Court concluded in *Metlakatla v. Egan* that "the State of Alaska had received complete jurisdiction." Amici Brief, p. 21. This Court made no such finding as to Metlakatla. Rather the Court in *Egan* recognized that federal authority over the reservation was established in the 1891 statute creating the reservation. 369 U.S. at 52. This Court further recognized that this statute authorized the Secretary of the Interior to promulgate rules and regulations to govern fishing within the reservation and *precluded* state jurisdiction. 369 U.S. at 59.

The regulations, promulgated under the authority of the 1891 Act, 25 U.S.C. § 495, formerly codified at 48 U.S.C. § 358, provide that the Annette Islands Reserve is an "exclusive" fishery, 25 C.F.R. § 241.2(b) (1963), and that any persons fishing therein without authority of the Community "shall be subject to prosecution under the provisions of section 2 of the Act of July 2, 1960 (74 Stat. 469, 18 U.S.C. § 1165)." *Id.* Section 1165 makes it a federal crime for any person to go upon Indian trust

or reserved land without permission for the purpose of hunting or fishing.

Thus, the federal government has properly asserted its authority and the authority of the Community over fishing on the Reserve to the exclusion of the State because the Reserve is a federal reservation under its supervision. This Court distinguished *Metlakatla v. Egan*, from its companion case, *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) based on the existence of a reservation. The court said:

> "The situation here differs from that of the Metlakatlans in that neither Kake nor Angoon has been provided with a reservation and in that there is no statutory authority under which the Secretary of the Interior might permit either to operate fish traps contrary to state law."

369 U.S. at 62.

Even the Supreme Court of Alaska recognized, in *Atkinson v. Haldane*, 569 P.2d 151, 156 (Alaska 1977), that the Secretary's regulations preempt State law because the Metlakatlans occupy a reservation.

Finally, Amici assert that in Alaska "Congress generally did not provide special or exclusive Indian rights in wildlife . . . ." Amici Brief, p. 19. To the contrary, the Annette Islands Reserve includes the waters surrounding the Annette Islands for the purpose of providing an exclusive fishery. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 90 (1918).

CONCLUSION

Metlakatla disputes any assertion or implication that its reservation is not Indian country, or that its exclusive fishery is not specifically reserved, or that it, or its members are subject to state laws (except to the extent expressly provided in Public Law 280). We respectfully request this Court avoid making any statements or

findings that will impinge on the unchallenged authority of the Metlakatla Indian Community or the Federal government over its reservation or its fishery. Indeed, if this Court addresses Metlakatla at all, it should be to acknowledge it is a federal Indian reservation and therefore Indian country under 18 U.S.C. § 1151(a).

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1997

STATE OF ALASKA,

Petitioner,

vs.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTEREST OF AMICI[1]

Amici Dean Rennard Strickland, Charles F. Wilkinson, Richard B. Collins, Carole E. Goldberg, Robert N. Clinton, David H. Getches, Ralph W. Johnson, and Monroe Price are full-time professors of law specializing in Indian law. All are authors and members of the editorial board of *Felix S. Cohen's Handbook of Federal Indian Law* 1982 edition (Michie Bobbs-Merrill) [hereinafter *Cohen*] as well as other books and articles in the field.

Our interest in this case is in maintaining the coherence of Indian law and the integrity of long-tested principles in that field. Following in the tradition of Felix Cohen's 1941 edition, the 1982 edition of the *Cohen* treatise sought to compile and explain the treaties, statutes, and constitutional provisions governing the relationship between the United States and native North American tribes. From this material the treatise has distilled fundamental and enduring principles.

We are concerned that the State of Alaska's brief in this case, relying heavily on an unpublished interpretation by an Interior Solicitor, charts a course for the Court that departs significantly from these enduring principles. Compounding our concern, the State fails to indicate to the Court how radical this departure would be. The State

---

[1] Counsel for the State of Alaska and the Village of Venetie have consented to the filing of this brief; letters of consent have been filed with the Clerk. Amici certify pursuant to Rule 37(6) that no part of this brief was authored by counsel for a party or any person other than one of the named amici curiae. No person other than amici curiae made a monetary contribution to the preparation or submission of this brief.

would have the Court abandon a distinctive framework for addressing questions of statutory interpretation in Indian law cases – a framework that demands a clear statement of Congress to alter the status of tribes in their relationship with the United States.

The most basic of tribal powers – the power to regulate conduct within the tribal territory – is at stake. The particular dispute before the Court involves the taxation of a non-Indian business building a school for Natives on tribal land, but any resolution of the case will dictate the extent to which the tribe can regulate its own members as well. The foundational principles of federal Indian law were developed for just such controversies.

The 1982 edition of the *Cohen* treatise sets forth these principles, and we summarize them in our argument. Nothing in the more recent jurisprudence of the Court has altered the principles applicable to this case.

SUMMARY OF ARGUMENT

A century and one-half of Indian law jurisprudence provides unique protections for the property and self-government of a small minority group against the overwhelming but indisputable power of the federal government. A cardinal principle of that law must be applied here to insist that Congress speak with clarity if it intends to extinguish the self-government of the Venetie Tribal Government. The tribe's former reservation, title to which was converted from trust to fee pursuant to the Alaska Native Claims Settlement Act (ANCSA), is still held for and occupied by the tribal members of Venetie.

As such, it continues to meet the statutory definition of "Indian country." Nothing in ANCSA states an intention otherwise. Indeed, every expression of Congress prior to and since that Act, from Public Law 280 in 1958 through ANCSA's amendments, treats tribal self-government of the village as if it were intact.

ARGUMENT

I. TRIBAL SELF-GOVERNMENT MAY BE ALTERED ONLY BY A CLEAR AND SPECIFIC STATEMENT OF CONGRESS

Tribal self-government is genuinely and visibly at stake in this case. Venetie is a remote and isolated village above the Arctic Circle, inhabited entirely by tribal members and a few professionals who serve them. All of the land is owned by the tribe, and nearly all of the services available locally to inhabitants are provided by the tribe or by the federal government under programs developed specifically for Indians. *State of Alaska* ex rel. *Yukon Flats School Dist. v. Native Village of Venetie Tribal Government*, 1995 U.S. Dis. LEXIS 11039, 11044-46 (D. Alas. Aug. 2, 1995). Venetie is thus as "Indian" a place as one can imagine, and certainly more distinctly Indian than many reservations in other parts of the United States. Tribal self-government is essential if Venetie is to be able to sustain its own way of life.

One of the most fundamental principles of Indian law is that tribal powers of self-government may be extinguished only by a clear and specific expression of Congress. The 1982 edition of the *Cohen* treatise twice articulated this principle:

> Once powers of tribal self-government or other Indian rights are shown to exist, by treaty or otherwise, later federal action which might arguably abridge them is construed narrowly in favor of retaining Indian rights. The principle of a "clear and plain statement" before Indian treaty rights can be abrogated also applies in nontreaty contexts. . . . The canons are variously phrased in different contexts, but generally they provide for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited.

Cohen, supra at 224-25 (footnotes omitted).

> Before holding that treaties or statutes limit tribal powers . . . the courts have insisted upon a clear and specific expression of congressional intent to extinguish traditional prerogatives of sovereignty.

Cohen, supra at 242 (footnotes omitted).

This principle has been applied in cases construing congressional delegation of jurisdiction over Indians to states, *Bryan v. Itasca County*, 426 U.S. 373 (1976); in cases construing federal laws directly limiting exercises of tribal sovereignty, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); and in cases construing congressional acts that arguably contract the territorial basis for tribal sovereignty (i.e., Indian country), *Solem v. Bartlett*, 465 U.S. 463

(1984). In each instance, the Court has required either an express statement in the statutory text or some unmistakable indication from the circumstances surrounding the enactment before it would allow tribal self-government to be diminished. When there was ambiguity or uncertainty regarding congressional intent, the principle dictated, and the Court insisted, that tribal self-government remain intact.

In applying the requirement of a clear and specific statement, it is not enough to identify the more persuasive rendering of Congress's intent between two competing versions. Under this incorrect approach, the principle of clear and plain expression would function only as a "tie-breaker" in the event the Court could not find one version more persuasive than the other. Rather, more like the burden of persuasion in criminal cases, the Court must determine whether there is any reasonable basis for doubting that Congress intended to extinguish tribal self-government. If any reasonable doubt exists, then the principle requires that tribal sovereignty be upheld. Thus, when this Court has been confronted with constructions of statutes and treaties that would effectively "reverse the general policy of the government towards the Indians," it has said that "[t]o justify such a departure . . . requires a clear expression of the intention of Congress. . . . " *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883).

The principle of clear and specific expression, and the cases that apply it, "reflect a pervasive influence of (a) the tradition of federal policy to encourage the development and exercise of tribal self-governing powers and (b) the assumed federal obligation to preserve and protect those powers." *Cohen, supra* at 242-43. Since publication

of the 1982 edition of the *Cohen* treatise, this policy and the associated federal responsibility have been more widely and fully elaborated than at any time since the early treaty period of United States-tribal relations. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7601(d), 7602(r) (tribes treated as states); Tribal Self-Governance Act of 1994, 25 U.S.C. §§ 450n, 450aa note, 450aa-450gg (extending and making permanent systems for tribal control over federally-funded services to tribes); Defense Appropriations Act for FY 91, Pub. L. No. 101-511, § 8077(b)-(d) (1990) amending 25 U.S.C. § 1301(2) (affirming tribal criminal jurisdiction over non-member Indians), *see* 25 U.S.C.A. § 1301 and note (Supp. 1997); Office of the Administrator, United States Environmental Protection Agency, *EPA Policy for the Administration of Environmental Programs on Indian Reservations* (Nov. 8, 1984) (recognizing tribes as governments responsible for making decisions and carrying out program responsibilities affecting reservations). Thus the historical and doctrinal foundations for the principle remain secure.

The normative basis for the principle of clear and specific expression is found in fundamental works of Anglo-American political theory and finds full expression in the United States Constitution. This theory makes political legitimacy turn on "the consent of the governed." *See* John H. Ely, *Democracy and Distrust* (1980); Richard Collins, *Indian Consent to American Government*, 31 Ariz. L. Rev. 365 (1989). When Congress exercises its broad constitutional power over Indian affairs,[2] the legitimacy of its action is questionable under any theory

[2] *See Cohen, supra* at 207, for an explanation of this power.

requiring consent of the governed. Under this circumstance, the principle of clear and specific expression operates to moderate federal incursions into tribal sovereignty, while maintaining Congress's ultimately broad power.

In this case, the Court is asked to construe two federal statutes: the 1948 Indian country statute, 18 U.S.C. § 1151, and the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43 U.S.C. §§ 1601-1628, as amended. The principle of clear and specific expression provides a distinct framework for interpreting both of these statutes and their interrelationship.

II. THE INDIAN COUNTRY STATUTE COVERS THE LAND OF THE VENETIE TRIBE

The Indian country statute identifies geographic areas where tribes retain governmental authority. This statute includes "reservations" (§ 1151(a)), "dependent Indian communities" (§ 1151(b)), and "allotments" (§ 1151(c)). The statute codified, in broad and comprehensive terms, prior judicial interpretations of the territory within which federal policy protects tribal self-government. As this Court recently stated:

> Congress has defined Indian country broadly. . . . F. Cohen, Handbook of Federal Indian Law 34 (1982 ed.) ("[T]he intent of Congress, as elucidated by [Supreme Court] decisions, was to designate as Indian country all lands set aside by whatever means for the residence of tribal Indians under federal protection, together with trust and restricted Indian allotments.").

Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 123, 125 (1993).

At issue in this case is whether former reservation land held in fee by an Alaska Native village, which is a federally recognized tribe, and inhabited by its members constitutes a "dependent Indian community" within the meaning of the Indian country statute. The State of Alaska argues that this land qualifies as a "dependent Indian community" only if Congress expressly designates it as such. Pet. Brief at 20. Yet the applicability of Indian law to Alaska and Alaska Natives and, but for a few aberrational lower court decisions, the existence of Indian country in Alaska have continued from earliest times. As Felix Cohen wrote in 1941,

> The legal position of the individual Alaskan natives has been generally assimilated to that of the Indians of the United States. It is now substantially established that they occupy the same relation to the Federal Government as do the Indians residing in the United States; that they, their property, and their affairs are under the protection of the Federal Government; . . . and that the laws of the United States with respect to the Indians resident within the boundaries of the United States proper are generally applicable to the Alaskan natives.

Felix S. Cohen, *Handbook of Federal Indian Law* 404 (1941) [hereinafter *1941 Cohen*].

When doubts arose about administration of justice in Alaska in 1958, Congress acted to extend Public Law 280 (and hence a large measure of state jurisdiction) over Alaska, a law that specifically refers to Indian country

and continues in force in the state. 18 U.S.C. § 1162(a); 28 U.S.C. § 1360(a); *Cohen, supra* at 764. The state now contests an exercise of the tribe's residual jurisdiction to tax and regulate that survived Public Law 280. *See Cohen, supra* at 362-368.

Not only does the State of Alaska's view of the Indian country statute overlook the historic federal treatment of Alaska Native villages, it thoroughly disregards the principle of clear and specific expression. No language in the Indian country statute expressly requires affirmative congressional designation of "dependent Indian communities." Furthermore, the earlier decisions of this Court that Congress codified in the Indian country statute, especially *United States v. Sandoval*, 231 U.S. 28 (1913), did not insist that Congress make such a designation.

At the time *Sandoval* was decided, there was no statutory definition of Indian country, though many statutes depended on the concept. This Court and lower federal courts necessarily undertook to define Indian country on a case-by-case basis. The result was extremely uneven. Decisions varied from the practical to the highly technical. For a fine distinction, compare *Clairmont v. United States*, 225 U.S. 551 (1912) (right-of-way across tribal land not Indian country because Indian title fully extinguished), with *United States v. Soldana*, 246 U.S. 530 (1918) (similar right-of-way was Indian country because an easement with underlying tribal fee). Congress in 1948 resolved every conflict created by these decisions in favor of the more expansive definition of Indian country.

The New Mexico history is particularly instructive. The territorial federal courts had taken upon themselves the decision that members of the Pueblo tribes were not really Indians because they were too "civilized." So their lands were not Indian country and were ineligible for federal protection from encroaching settlers (who, of course, were the ones making this argument to the courts). Although this reading did great violence to statutory language, this Court unfortunately accepted it in *United States v. Joseph*, 94 U.S. 614 (1877). Eventually, Congress had to specify that this had been an error, and the Court sustained the congressional judgment in *Sandoval*, admitting that the Court's description in *Joseph* had been "based upon statements in the opinion of the territorial court . . . which are at variance with other recognized sources of information." 231 U.S. at 49. But this left an enormous legal quagmire about the competing rights of the tribes and encroaching settlers, which was resolved at great expense under the Pueblo Lands Act of 1924. *See 1941 Cohen, supra* at 385-93.

In many instances, local non-Indians who have found federal protection of Native Americans to be an obstacle to their interests have asserted technical readings of Indian legislation to reduce or eliminate that protection. In some instances, the courts have succumbed. Congress in 1948 rejected these efforts in defining the scope of Indian country. Alaska now attempts another such claim. It should be rejected because Congress intended otherwise, and because past wanderings of judicial attention from congressional will have been disastrous.

The 1982 *Cohen* treatise provides a reading of the "dependent Indian community" language of the Indian

country statute that accords with the principle of clear and specific expression:

> Read together, 18 U.S.C. §§ 1151(a) and (b) employ a functional definition focusing on the federal purpose in recognizing or establishing a reasonably distinct location for the residence of tribal Indians under federal protection.

Cohen, supra at 39. This reading relies on Congress to provide some reasonable delineation of the territory where federal protections apply, without requiring any specific designation of Indian country status. Thus, the many federal statutes designating Alaska Native village lands and village corporation lands as the site of special jurisdictional arrangements (*see, e.g.*, Indian Child Welfare Act, 25 U.S.C. § 3202(9); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601(36), 9626) and eligibility for federal Indian benefits (*see, e.g.*, Tribally Controlled Community College Assistance Act, 25 U.S.C. § 1801; Native American Programs Act of 1974, as amended, 42 U.S.C. § 2991 et seq.) supply all that is required to identify the existence of a "dependent Indian community."

Applying this analysis to Alaska, the 1982 *Cohen* treatise concludes,

> As long as the indicia of dependence exist and Native people continue to reside together in a reasonably distinct location recognized as their residence by the federal government, they should be considered "dependent Indian communities." The authority of a traditional or IRA government over an area does not depend on ownership of land within the area by the tribal

> government itself. Indeed, the statutory definition of Indian country was intended to eliminate reliance on land titles in these matters. Boundaries created for other purposes, however, may be useful in showing the minimum area to be considered the domain of a dependent Indian community. These areas include lands that are patented to Native corporations, owned by tribal governments, located within former reservations, and located within Native villages which are municipalities, so long as they remain part of Native communities.

Cohen, supra at 766-67.

In contrast, the interpretation of the Indian country statute that the State of Alaska proposes would abrogate powers of tribal self-government that existed before the enactment of that statute. Such a reading directly contravenes the principle of clear and specific expression, which resolves ambiguities and uncertainties in favor of the preservation of tribal sovereignty. Given the silence of the statute itself and the broad intent of the 1948 codifiers, there is no basis for introducing a requirement that Congress specifically designate territory as Indian country.

III. ANCSA CANNOT BE CONSTRUED TO EXTINGUISH TRIBAL SELF-GOVERNMENT IN THE VILLAGE OF VENETIE

The second statute that the Court is asked to construe in this case is ANCSA. ANCSA resolved land claims through cash payments and by transferring territory in fee to village and regional corporations organized under

state law, yet subject to substantial federal regulation and restrictions. Tribal governments remain intact with continuing importance in the Native self-governance of villages. *See Cohen, supra* at 765. The State of Alaska, however, contends that ANCSA extinguished Indian country in that state. According to the principle of clear and specific expression, it is the State's burden to demonstrate Congress's unmistakable intent to abrogate tribal self-government.

1. Revocation of the Venetie Reserve Converted Land Tenure But Did Not Extinguish Venetie Self-Government or Indian Country

It is uncontroverted that Indian country existed in Alaska before ANCSA. Pet. App. 67a. ANCSA is devoid of language expressly extinguishing tribal jurisdiction or Indian country. Moreover, recognizing the continuing controversy inherent in the governance issue, Congress chose to avoid the question, leaving undisturbed the status quo ante as to tribal governance in Alaska villages when it mandated in 1987 amendments to the Act that the legislation should not be construed as determining whether any federally recognized tribe "has or does not have governmental authority over lands . . . or persons . . . . or that Indian country exists or does not exist within the . . . state of Alaska." 43 U.S.C.A. § 1601 note (Supp. 1997).

Lands held for Natives in Alaska took on a unique form of tenure after ANCSA, but that did not change Venetie's right of self-government. Under § 19 of ANCSA, most reserves were "revoked," extinguishing the trust

title of the lands. 43 U.S.C. § 1618; *Cohen, supra* at 747. Villages then took title to lands in one of two ways: 1) Most villages received land rights through newly-formed corporations that took fee title to lands (possibly including former reserve lands) selected pursuant to other provisions of the Act – with surface rights held by a village corporation and subsurface rights held by a regional corporation; 2) For a handful of villages, including Venetie, reserves could be continued in an altered form of ownership, with fee title to both surface and subsurface of lands in "any reserve set aside for its members or stockholders prior to" ANCSA to be held by the land-holding corporation set up for that village. *See* 43 U.S.C. § 1618(b). Venetie made this election at considerable cost; accepting its former reserve lands required stockholders to relinquish eligibility to select additional lands from the 40 million acres of public lands made available to Natives under ANCSA, to receive funds distributed by regional corporations, or to be issued stock in a regional corporation.

All that changed for Venetie with the enactment of ANCSA was the title to its land. It was no longer denominated a "reserve" held in trust by the United States. The very same lands were held and managed by a special corporation whose creation was mandated by Act of Congress. As this Court recently said, "the test for determining whether land is Indian country does not turn upon whether the land is denominated 'trust land' or 'reservation'" so long as it has been "validly set apart for the use of the Indians as such, under the superintendence of the Government." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (non-

reservation trust land), citing and quoting *United States v. John*, 437 U.S. 634, 648-649 (1978) (purchased lands later declared to be in trust for certain resident Choctaws), and *United States v. McGowan*, 302 U.S. 535, 539 (1938) (lands purchased for Indians in Nevada).

Thus, ANCSA did not alter the practical relationship of Venetie members to their land, other than effecting a release from federal controls associated with trust title. Under the terms of the statute, the land went from reservation status to ownership by the Native village corporation controlled by tribal members, to ownership by the tribal government itself. 43 U.S.C. § 1618(b). Congress did not specify that the former reservation lands should be restored to or denominated public domain, as it had done in many turn-of-the-century statutes revoking or diminishing reservations. *See Hagen v. Utah*, 510 U.S. 399 (1994). There was no real change in right to possession and no change in occupancy by the members of the Native village. Throughout the process that ANCSA set in motion, Venetie has remained a remote community inhabited almost entirely by tribal members and exercising substantial powers of self-government.

2. ANCSA Was Intended to Deal Only With Land Tenure and Compensation, Not Tribal Governing Powers

It should be clear from the text of ANCSA that it was intended to resolve the land claims of Alaska Natives, nothing more, nothing less. Although embellished with

unprecedented complexities for selecting lands, distributing revenues, and corporate management of the settlement, the Act was simply Indian land claims legislation that replicated the results achieved by treaties, legislation, and judicial claims awards elsewhere in the country. It allowed Natives to retain a portion of their aboriginal territory, and to receive compensation for the lands where their title was extinguished. Thus ANCSA extinguished aboriginal title over most of the state – essential to developing Alaska resources and selection of lands promised to the State at statehood. Its provisions for retaining Native lands and receiving compensation were preceded by declarations that eschewed any creation or expansion of federal trusteeship but vested unprecedented control of lands in Natives and Native-controlled institutions. *See Cohen, supra* at 740-41.

ANCSA's land tenure and other provisions are consistent with congressional intent to enhance rather than terminate the self-governing powers of Alaska Natives. Contemporary expressions of federal policy by President Nixon (*see Special Message to the Congress on Indian Affairs*, [1970] Pub. Papers 564, July 8, 1970), as well as congressional statements at the time of enactment (*e.g.*, Statement of Alaska Congressman Nick Begich, 177 Cong. Rec. 46,789 (Dec. 14, 1971)) stress the importance of tribal self-determination, which would be enhanced, not destroyed, by release from oppressive federal bureaucratic controls. These contemporaneous expressions of congressional intent are reflected in subsequent congressional actions in other statutes reaffirming and supporting Alaska Native sovereignty. Furthermore, the express continuation of

federal services to Alaska Natives demonstrates congressional policy of maintaining its special protective relationship to tribes in that state. *See Cohen, supra* at 766, 769-70.

CONCLUSION

Venetie is now and has always been an isolated community of Alaska Natives. Its relationship with the federal government is longstanding, and includes federal protection and support for tribal self-government. At most, ANCSA contains a conversion of the former Venetie Reserve to village corporation title as part of a congressional scheme to resolve land claims and enable the Natives to achieve greater and more secure control over their ancestral territories. Thus, there was no clear expression of Congress to terminate Venetie's powers of tribal self-government as required by fundamental principles of Indian law.

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NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT,
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On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* KONIAG, INC., IN SUPPORT OF RESPONDENTS NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *ET AL.*

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Felix S. Cohen, *Handbook of Federal Indian Law* (1982 ed.) 5,14,20
Monroe E. Price, *Region-Village Relations Under the Alaska Native Claims Settlement Act* 5 Alaska L. Rev. 58 (1975) 4,25
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 96-1577

STATE OF ALASKA,
Petitioner,

v.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT,
et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* KONIAG, INC., IN SUPPORT OF RESPONDENTS NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *ET AL.*

INTEREST OF THE *AMICUS CURIAE*

Koniag, Inc. (hereinafter Koniag)[1] is a regional corporation formed pursuant to the Alaska Native Claims

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[1] This brief is filed with the consent of the parties and their letters of consent have been lodged with the Clerk of this Court.

Settlement Act (hereafter ANCSA).[2] All its directors are Alaska Natives and the vast majority of its shareholders are also Alaska Natives. About half of its shareholders are also shareholders of village corporations within the geographical boundaries of its region, and about half of its shareholders are not. Koniag has a direct and substantial interest in matters affecting Alaska Natives generally and ANCSA specifically as its existence and its obligations to its shareholders are derived from that Act. Koniag brings to this controversy the unique perspective of an Alaska Native Regional Corporation. It urges this Court to affirm the result reached by the Ninth Circuit that the Venetie lands in accordance with the universal wishes of its tribal members be accorded the status of Indian Country. Koniag's central interest as amicus, however, is to urge that the Ninth Circuit's unnecessarily expansive holding be limited to the peculiar facts presented in Venetie because to do otherwise will, as Judge Fernandez admonishes, open "a blizzard of litigation." That litigation in Koniag's view will not be with the State of Alaska, but instead will be between Alaska Natives, possibly pitting Koniag itself against villages within its constituent region, and possibly pitting its Alaska Native shareholders one against another. To understand why this is so, especially for a regional corporation, Koniag explains first its role within ANCSA.

INTRODUCTION

In passing ANCSA, Congress settled upon a complex formula intended to satisfy a variety of goals. Settlement, said Congress, should be accomplished "in conformity with the real economic and social needs of Natives, without litigation ... without establishing any permanent racially defined institutions, rights, privileges or obligations, without creating a reservation system or lengthy wardship or trusteeship ...."[3] To effect these

[2] 43 U.S.C. § 1606(d).

[3] 43 U.S.C. § 1601(b).

goals, Congress created two overlapping private corporate entities to receive the land and money provided Alaska Natives under the Act.[4] These entities included regional corporations, such as Koniag, and village corporations, like *Amicus* Shee Atika, Inc.[5]

In effecting settlement of Alaska Native land claims, Congress sought to insure that all living Alaska Natives benefited from the settlement.[6] Neither residency in a particular community nor choice of lifestyle was to play a role in the selection of those entitled to the settlement. Although regional corporations serve a variety of critical functions under ANCSA, perhaps their most important role is to serve as the vehicle for ANCSA's goals of disbursing settlement money, equitably allocating income from resource development, and managing lands for all Alaska Natives.

Dividing the state into twelve regions composed, "as far as practicable, of Natives having a common heritage and sharing common interests," ANCSA provided for a corporation for each one of these regions.[7] ANCSA also provided for an optional thirteenth regional corporation for Alaska Natives who did not reside in Alaska.[8] To determine enrollment in the regional corporations, ANCSA required that the Secretary of the Interior create a roll of all Natives "born on or before, and

[4] 43 U.S.C. §§ 1606, 1607.

[5] Shee Atika, Inc. is actually an urban corporation (43 U.S.C. § 1613(h)(3)) which does not functionally differ from village corporations for the purposes of this section.

[6] 43 U.S C. § 1604(a).

[7] 43 U.S.C. § 1606(a).

[8] 43 U.S.C. § 1606(c). Indeed a thirteenth regional corporation was formed. Since it shares only in the monetary and not land entitlements under ANCSA, only the twelve Alaska regional corporations are considered in this brief.

who are living on, December 18, 1971."[9] Individual Alaska Natives were then given the opportunity to enroll to the various regional corporations based on their current place of residence.[10] If, at the time of the roll, an Alaska Native was not a permanent resident within the area encompassed by one of the twelve corporations he or she would be allocated to one of the corporations based on a list of prioritized factors.[11] This scheme insured that all living Alaska Natives were enrolled in one of the regional corporations.[12]

Under its two tier system, ANCSA also provided for the formation of village corporations.[13] ANCSA provided a list of over 200 such villages and criteria by which the villages could be added or removed from the list by the Secretary of the Interior.[14] Unlike regional

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[9] 43 U.S.C. § 1604(a).

[10] 43 U.S.C. § 1604(b).

[11] *Id.*

[12] Although ANCSA places restrictions on a shareholder's rights of alienation, under the initial statute shares were freely inheritable without consideration for the nativeness of the beneficiary. 43 U.S.C. § 1606(h) (amended 1980 & 1991). Accordingly, just as Congress anticipated non-resident shareholders, it also anticipated a limited number of non-native shareholders.

[13] 43 U.S.C. 1607(a). Although distinct entities, a regional corporation and village corporations within its region are closely intertwined in a variety of ways. *See generally*, Monroe E. Price, *Region-Village Relations Under the Alaska Native Claims Settlement Act*, 5 Alaska L. Rev. 58 (1975) (Price I); and Monroe E. Price, *Region-Village Relations Under the Alaska Native Claims Settlement Act - Part II*, 5 Alaska L. Rev. 237 (1976) (Price II).

[14] 43 U.S.C. § 1610. *Koniag, Inc., Village of Nyak v. Andrus*, 580 F.2d 601, 606 (D.C. Cir.), *cert. denied*, 439 U.S. 1052 (1978).

corporations, not all Alaska Natives were enrolled in a village corporation.[15] If, at the time of the 1970 census, an Alaska Native was not a resident, as defined,[16] of a particular village, that person would receive enrollment to a regional corporation only.[17] Accordingly, although all village corporation shareholders were also regional corporation shareholders, not all regional shareholders were also village corporation shareholders. Nevertheless, for reasons addressed at length in the brief of *Amicus* Shee Atika, village corporations and Alaska Native Villages had divergent memberships even from the date of ANCSA's passage.[18]

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[15] 43 U.S.C. § 1604(b).

[16] The regulations implementing ANCSA defined permanent residence as "the place of domicile on April 1, 1970, which is the location of the permanent place of abode intended by the applicant to be his actual home . . . . A region or village may be the permanent residence of an applicant on April 1, 1970, even though he was not actually living there on that date, if he has continued to intend that place to be his home." 25 C.F.R. § 43h.1(k) (1972) (removed, 53 Fed. Reg. 21995 (1988)). Because actual physical residence was not required by these regulations, from the outset village corporate enrollment included Alaska Natives who did not dwell in the village itself.

[17] *See* 43 U.S.C. § 1604(b).

[18] *See* Br. of *Amicus* Shee Atika at 6-11. Unlike the regional corporations in which shareholder status was determined by statute, voting membership in the village governments is determined by the village itself. Felix S. Cohen, Handbook of Federal Indian Law 248 (1982 ed.). Village governments are free to restrict voting membership only to those persons actually physically residing within the village. *See* Br. of *Amicus* Shee Atika, Appendix at 14a (limiting new membership to those persons "who set[ ] up a permanent home in the vicinity of the Tribe . . . ."). Village membership, therefore, is in constant flux as Alaska Natives move to and from the village and as residents reach the age of majority or die. By contrast, these demographic factors do not affect ANCSA shareholder status to the same degree. For example,

One can see these patterns of divergent membership in the history of Koniag itself. The Koniag region encompasses approximately 7,300 square miles and includes within its borders the Kodiak Island group and a portion of the upper Alaska Peninsula. Shortly after ANCSA's passage, Koniag had 3,340 shareholders, 1,958 of whom resided within the region.[19] Thus, 1,382 or 41% of Koniag's shareholders were at-large shareholders who neither held stock in a village corporation nor physically resided in a village.

Like all ANCSA regional corporations, Koniag is incorporated under the laws of Alaska to conduct business for profit.[20] By requiring that Koniag and the other regional corporations incorporate on a for-profit basis, Congress assured that all regional corporation shareholders received the democratic protections provided under statutory and corporate common law.[21] Koniag and its fellow corporations all bear a substantial

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a person born after ANCSA's enrollment date, regardless of their nativeness or their residency in a particular village or region has no automatic entitlement to shareholder status in either a regional or village corporation. Accordingly, ANCSA's structure assured not only that village residency and shareholder status would be divergent at the outset, but that this divergence would necessarily increase over time.

[19] Robert D. Arnold, Alaska Native Land Claims 166 (1978).

[20] 43 U.S.C. § 1606(d). Although also required to incorporate under the laws of the state of Alaska, the village corporations were given the option of incorporating either as a for-profit or non-profit corporation. 43 U.S.C. § 1607(a). Despite this choice, all of the village corporations opted to organize on a for-profit basis. Arnold, *supra*, at 198.

[21] *See generally* Douglas M. Branson, *Square Pegs in Round Holes: Alaska Native Claims Settlement Corporations Under Corporate Law,* 8 Alaska L. Rev. 103, 119 (1979) (arguing that regional corporations must act with extreme care in pursuing policies that appear to benefit one village within the region).

obligation to insure that the interests of each one of its shareholders is equally benefited by the profits of the corporation.

In disbursing land under ANCSA, Congress was faced with a particularly difficult task. Congress had to balance the need to protect traditional Alaska Native use of the land with its desire to provide the benefits of settlement to all Alaska Natives. One way in which Congress resolved this problem, was, with a few exceptions, to provide for dual ownership between regional and village corporations over the land selected by village corporations. Under this scheme, village corporations obtained the surface rights to village corporation selections, while the regional corporations generally obtained the subsurface rights.[22] ANCSA provided only one situation in which a village corporation might unilaterally obtain both the surface and subsurface rights to ANCSA lands.[23] ANCSA provided that a "Village Corporation or corporations may elect within two years to acquire title to the surface and subsurface estates in any reserve set aside for the use or benefit of its stockholders or members prior to December 18, 1971."[24] It is this provision that provided the Appellee's, the Village of Venetie (hereinafter Venetie), with the land they now seek to treat as Indian Country.

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[22] 43 U.S.C. § 1613(a),(e). ANCSA provided an exception to this rule for situations in which the village corporation selection included land within a national wildlife refuge. In such cases, the subsurface estate was retained by the federal government. 43 U.S.C. § 1611(a)(1).

[23] In certain circumstances, regional corporations were entitled to select land independently of the village corporations. In such cases, the regional corporation generally obtained both the surface and subsurface estate. 43 U.S.C. § 1611(c).

[24] 43 U.S.C. § 1618(b).

Except for those village corporations selecting former reservation land, ANCSA permitted village corporations to select land based on the number of residents enrolled to the village.[25] As a means of honoring traditional village interests, village corporations were required to select lands enclosing the village and were permitted to select additional lands from surrounding townships.[26] At the same time, village corporation selections often reflected a combination of traditional and economic motivations. For instance, village corporations were limited in their ability to select lands within national wildlife refuges.[27] Additionally, all selections were subject to prior existing rights.[28] Consequently, in many instances, the village corporation's land entitlement could not be satisfied with lands adjacent to the villages. Thus, the selection process resulted in village corporations selecting lands, in some cases, several hundred miles from the village itself.[29] These distant selections were often based primarily on the economic value of the land rather than on any traditional link to the land itself.[30]

As to all lands selected by the village corporations, ANCSA required that the corporations "convey to any Native or non-Native occupant, without consideration, title to the surface estate in the tract occupied as of December 18, 1971 ... as a primary place of residence, or

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[25] 43 U.S.C. § 1613(a).

[26] 43 U.S.C. § 1613(b).

[27] 43 U.S.C. § 1611(a)(1).

[28] 43 U.S.C. § 1613(g).

[29] *See e.g.*, Arnold, *supra*, at 243, 247 (noting village corporation selections in one instance over 300 miles from the village and in another approximately 50 miles distant).

[30] *E.g.*, *id.* at 246.

as a primary place of business, or as a subsistence campsite, or as headquarters for reindeer husbandry."[31] The corporations were also required to convey to any "Municipal Corporation in the Native village or to the State in trust for any Municipal Corporation established in the Native village in the future, title to the remaining surface estate of the improved land on which the Native Village is located ...."[32]

Koniag's history offers an excellent example of the way in which ANCSA's disbursement scheme resulted in a complex pattern of ownership of ANCSA land. Because a large portion of the lands within Koniag's regional boundaries included a previously established national wildlife refuge and because Koniag's deficiency lands were distant and difficult to reach by the residents within the region, Koniag and certain of the village corporations (the "deficiency village corporations") within the region were unable to select acceptable lands sufficient to satisfy the amounts allotted to them by ANCSA.[33] In order to resolve this and other issues facing the Koniag region, Koniag sought a legislative solution.[34] In a part of the Alaska National Interests Lands Conservation Act (ANILCA),[35] Congress allowed Koniag and the deficiency village corporations within the region to exchange selection rights to distant land along the Alaska Peninsula for more proximate land previously designated as part of the Chugach National Forest.[36] That land,

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[31] 43 U.S.C. § 1613(c)(1).

[32] 43 U.S.C. § 1613(c)(3).

[33] Alaska National Interest Lands Conservation Act of 1979: Hearings on H.R. 39 Before the House Comm. on Interior and Insular Affairs, 96th Cong., 1st Sess. 1215 (1979) (statement of Edward Weinberg, counsel for Koniag).

[34] *Id.* at 1218.

[35] Pub. L. No. 96-487, 94 Stat. 2371 (1980) § 1427.

however, was not provided to Koniag and the village corporations in the manner previously determined by ANCSA. Rather, ANILCA required that Koniag and the deficiency village corporations enter into a joint venture which would receive and manage the surface estate of the land.[37] The subsurface rights to the land were conveyed solely to Koniag.[38]

During the first decade after ANCSA's passage, certain of the village corporations within the Koniag region merged with Koniag. Following litigation challenging the effect of the merger,[39] only two of the village corporations remain merged with Koniag. Koniag is now the owner of the surface rights to the lands originally selected by those two village corporations as well as the subsurface rights to the village selections which were outside the wildlife refuge. In exchange, the shareholders of those village corporations received additional shares in Koniag. One of those village corporations was the ANCSA village corporation for the Village of Karluk.

Prior to ANCSA's passage, Karluk resided on a reservation established by Executive Order.[40] Unlike Venetie, the shareholders of the Karluk Village

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[36] *Id.* § 1427(b).

[37] *Id.* § 1427(c).

[38] *Id.* § 1427(b). In another provision of ANILCA affecting the Koniag region, certain village corporations representing villages that had been denied certification under ANCSA were provided with one square mile of land. *Id.* § 1427(e)(3)(A). As under ANCSA, when the surface estate was not within a wildlife refuge, the subsurface estate to that land was conveyed to Koniag.

[39] *See Leisnoi, Inc. v. Stratman*, 835 P.2d 1202 (Alaska 1992).

[40] Arnold, *supra*, at 86-87; David S. Case, Alaska Natives and American Laws 103-07 (1984); *see also Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949).

Corporation opted not to acquire title to the surface and subsurface of its former reserve.[41] Instead, they opted to receive the normal benefits of the Act including enrollment in both village and regional corporations.[42] Because Karluk merged and remains merged with Koniag,[43] each former Karluk corporation shareholder now holds additional shares of Koniag stock and Koniag owns the lands originally patented to the Karluk Village Corporation. In direct contrast to Venetie, the lands surrounding the community of Karluk, including much of the former reservation, are now owned in fee simple by the regional corporation and not by the village corporation for the Village of Karluk.[44]

SUMMARY OF ARGUMENT

Koniag supports the Ninth Circuit's determination that the former reservation land now held in fee by the Village of Venetie satisfies the definition of Indian Country. Koniag, however, is concerned that much of the Ninth Circuit's reasoning, especially when applied to lands held by regional corporations, is contrary to the language and intent of ANCSA. In short, Koniag believes that the Ninth Circuit failed to recognize the full effect of Congress' resort to the corporate form in settling Alaska Native claims. Ignoring the enormous diversity among regional corporation shareholders, the Ninth Circuit erroneously reduced all Alaska Native shareholders to a

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[41] Arnold, *supra*, at 199.

[42] 43 U.S.C. § 1618.

[43] 43 U.S.C. § 1627 (permitting, under certain circumstances, merger of village corporations with regional corporations).

[44] Implicit in the Karluk Village Corporation shareholder's decision to merge their village corporation with the regional corporation is the agreement by the village shareholders to cede management of their corporation's land interests to the regional corporation in which the village shareholders are a minority.

single interest. Pursuing this reasoning to its logical end, the Ninth Circuit determined that, regardless of its continued ownership by a regional corporation, all ANCSA land was amenable to the designation of Indian Country. This conclusion wrenches control of the land away from corporations that must represent the interests of all of their shareholders and places it in the sole hands of village governments who owe no similar obligation.

As an Alaska Native corporation, Koniag appreciates the critical importance of sovereignty and autonomy for Native Villages. Moreover, Koniag strongly believes that Indian Country does exist in Alaska. At the same time, Koniag asserts that Indian Country, when applied to land still held in whole or in part by a regional corporation, is incompatible with Congress' intent to bestow the benefits of settlement on all Alaska Natives.

ANCSA created a complex layering of Native interests, no one of which was to be unduly favored to the disadvantage of others. The reasoning of the Ninth Circuit, including much that is not necessary to its conclusion, upsets this delicate balance. By granting authority over corporate owned land to village governments, the Ninth Circuit pits non-resident shareholders against resident shareholders. This outcome not only contradicts Congress' explicit intent, but it threatens a "blizzard of litigation" amongst Alaska Natives. A just resolution of this dispute will restore to all ANCSA shareholders the benefit Congress provided them under ANCSA and allow them to choose the governance of their lands.

I. ALTHOUGH OVERLAPPING, THE INTERESTS OF ALASKA NATIVE SHAREHOLDERS AND VILLAGE MEMBERS ARE NOT SYNONYMOUS

A. Alaska Native Villages and Alaska Native corporations do not share a unity of persons.

As the statutory structure makes clear, ANCSA created a necessary distinction between shareholders and village residents. This distinction insured that all Native Alaskans would receive the benefits of the Act regardless of their place of actual physical residence. The Ninth Circuit overlooked this distinction.

Examples of Congress' intent to separate receipt of benefit from place of residence abound, but are perhaps most obvious in the nature of the regional corporations themselves. Congress provided that an Alaska Native could be enrolled to a regional corporation if he or she had been born in the region or an ancestor had come from the region.[45] Accordingly, the land distributed under ANCSA was not distributed to corporations owned by Alaska Native Villages per se or even to Alaska Native Villagers, but to corporations owned by all Alaska Natives. This is not to say that villages were somehow excluded from the benefits of ANCSA. Alaska Native Villages did then and continue now to play crucial roles in the lives and culture of Alaska Natives. Nevertheless, it was the corporations, the shareholders of which included both village resident and non-resident shareholders, that were the actual recipients of ANCSA lands.

In crafting this structure, Congress conveyed its intent to avoid the creation of distinctions or privileged categories of Alaska Native shareholders. In other words, the non-resident Alaska Native shareholder was placed on an equal footing with the resident shareholder in the

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[45] 43 U.S.C. § 1604.

receipt of ANCSA benefits. The Ninth Circuit's opinion, however, by giving village governments the power to regulate ANCSA lands upsets this balance and creates the potential for village residents to disenfranchise non-resident shareholders.

Two of the principal powers of a sovereign tribe are the power to exclude non-members,[46] and the power to tax.[47] These powers, if applied to ANCSA land by Alaska Native Village governments might literally divert all benefit of that land from non-resident shareholders in favor of village residents.

A simple example illustrates this point. The principle benefit to Koniag of fee ownership of the subsurface estate to ANCSA land is the ability to profit from subsurface resources. Yet, if Koniag sought to obtain the benefit of those resources through the sale or lease of its subsurface rights, a village claiming rights to the land as a tribal sovereign could literally prevent such a transaction either by placing a prohibitive tax on the enterprise or by excluding all but village members from the land.[48] By exercising this power, village governments would be given virtual veto power over regional corporations ability to profit from their land. Thus, a

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[46] Felix S. Cohen, Handbook of Federal Indian Law 252 (1982 ed.).

[47] *Washington v. Confederated Colville Tribes*, 447 U.S. 134 (1980).

[48] The relative interests the village corporation owning the surface and the regional corporation owning the subsurface has been largely established. *See Koniag, Inc. v. Koncor Forest Resources*, 39 F.3d 991 (9th Cir. 1994) (holding that where no other practical source exists, village corporation may use subsurface resources, but must pay regional corporation reasonable price for such use); *Tyonek Native Corp. v. Cook Inlet Region*, 853 F.2d 727 (9th Cir. 1988) (holding that village corporations have no right to extract rock, sand and gravel from subsurface estate for commercial sale).

minority of resident shareholders could unilaterally foreclose non-resident shareholders from the benefits Congress provided them under ANCSA.[49]

Although the above example is simple, as additional competing interests are added, its ramifications become mind-bogglingly complex. To this point, we have focused primarily on the resident and non-resident categories of regional shareholders. Yet, even this model oversimplifies the nature of regional corporations. In fact, regional corporations include shareholders of far greater diversity. For example, assuming a shareholder resides in a village, he or she may reside in any one of several villages within the region's boundaries. Thus, the assertion of authority over regional corporation land by one village would divest every other village and village resident of the benefit of their interest in that land. Even more complicated, the regional corporations are required to place 70% of the revenues generated from timber and subsurface resources in a pool divided among the twelve regional corporations based on the number of shareholders originally enrolled to each region.[50] Fifty percent of the funds received are further distributed by the receiving regional corporations to their village corporations and "at large shareholders." The other 50% is retained by regional corporations to benefit all shareholders.[51] Clearly then, the regional corporations benefit all shareholders in all the regions. Thus, by permitting individual village governments to

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[49] The Ninth Circuit emphasized that under ANCSA "voting rights may be limited to Native stockholders." *State of Alaska v. Native Village of Venetie*, 101 F.3rd 1286, 1296 (9th Cir. 1996). This, however, does not bolster the Ninth Circuit's broad application of Indian Country to ANCSA land. As demonstrated, Native stockholders do not equate to village residents.

[50] 43 U.S.C. § 1606(i). Price II, *supra*, at 251-52.

[51] 43 U.S.C. § 1606(j).

determine the extent to which regional corporations can utilize and manage their land, the Ninth Circuit threatens to put village at odds with village, village resident with non-resident, and even region with region.

The Ninth Circuit's reliance on ANCSA Section 1602(j) is indicative of its truncated view of the statute. Section 1602(j) defines village corporations as a "business for profit or nonprofit, corporation to hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf of a Native Village ...." The Ninth Circuit determined that this provision demonstrated that ANCSA did, in fact, set aside land for Alaska Natives.[52] Nevertheless, even if the Ninth Circuit were correct that village corporations are synonymous with village governments (a questionable claim, but one better addressed by *Amicus* Shee Atika), it nevertheless has ignored the role regional corporations play in the distribution of ANCSA land. As explained above, except in the unusual case in which a village corporation selected a former reservation under ANCSA Section 1618(b) (as did the Appellees in this case), or where a village corporation is within a prior existing wildlife refuge, regional corporations are the owners of the subsurface rights to lands selected by a village corporation. Consequently, all shareholders of the regional corporation have equal claim to the benefit of the subsurface of that land.[53]

Equally problematic is the Ninth Circuit's frequent resort to the principle that ANCSA "should be liberally construed, and doubtful expressions should be

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[52] *Venetie*, 101 F.3d at 1295.

[53] This claim is merely bolstered by the fact that in some circumstances, as is the case with Koniag, village corporations have merged with their regional corporation. In such cases, the regional corporation becomes the owner of both the surface and subsurface estate where appropriate.

resolved in favor of the Indians."[54] The Alaska Native shareholders are far from the unitary stereotype apparently embraced by the Ninth Circuit. They are diverse, some living in remote villages, some in towns and small cities, and some in major metropolitan areas both within and outside of Alaska. Many have no relationship to any village. The Alaska Native shareholders of Koniag are in turn diverse from the shareholders of the remaining regions. Alaska Native shareholders and Alaska Native people simply do not fit a mold.

Ignoring the broad diversity among Alaska Natives, the Ninth Circuit reflexively equated Alaska Native interests with the interests of residents of Alaska Native Villages. This telescoping of Alaska Native interests into village government interests skews the true purpose of ANCSA -- benefiting all Alaska Native shareholders. The problem then, is not the court's recognition of the tremendous importance of Alaska Native Villages to a great many Alaska Natives, but the court's elevation of village governments to the exclusion of all other Alaska Native interests.

B. Alaska Native Villages and Alaska Native corporations do not share a unity of purpose.

Regional corporations are not solely motivated by profit.[55] As Alaska Native corporations, they must serve a diverse array of Alaska Native interests. Unquestionably, one of those interests is protecting land that has important social and cultural significance to the shareholders of the corporation.[56] The board of directors, the body charged with striking this balance, is elected by

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[54] *Venetie*, 101 F.3d at 1293-94 (internal quotations omitted).

[55] Arnold, *supra*, at 284.

[56] *Id.*

all the shareholders.[57] Because villages are now and will continue to be an important repository of Alaska Native values and culture, the elected corporate boards of regional corporations will continue to pursue policies that ensure the preservation and advancement of Native Villages. But like any broadly elected body, boards must be able to balance the interests of all of their constituents and to alter their policies as the needs of those constituents change. This combination of flexibility and conservation answers ANCSA' s call to satisfy the "real economic and social needs of natives,"[58] including the desire "to preserve for Indians ... the mobility which exists in American Society today."[59]

Although unique in the broad range of activities they may undertake on behalf of their shareholders, regional corporations are nonetheless governed by the same laws as any other Alaska corporation.[60] With a few exceptions, Alaska Native shareholders in ANCSA corporations possess "all rights of a shareholder in a business corporation organized under the laws of the State."[61] By mandating this corporate structure, ANCSA insured that regional corporations would be precluded from distributing corporate assets to one category of shareholders only.[62]

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[57] 43 U.S.C. § 1606(h).

[58] 43 U.S.C. § 1601(b)

[59] Alaska Native Land Claims: Hearing on H.R. 11213, H.R. 15049, and H.R. 17129 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 90th Cong., 2d Sess. 90 (1968).

[60] 43 U.S.C. §§ 1606(d), 1607(a).

[61] 43 U.S.C. § 1606(h)(1)(A)(iii).

[62] *See Hanson v. Kake Tribal Corp.*, 939 P.2d 1320, 1324 (Alaska 1997) ("One of the rights of a shareholder of a business corporation [including ANCSA corporations] is the

In addition to the implicit protections corporate law provides to ANCSA shareholders, Congress also included in ANCSA explicit protections against inequities among ANCSA Alaska Native shareholders. In Section 1606(e) of the Act, Congress required each regional corporation to submit its articles of incorporation to the Secretary of the Interior for approval. The sole purpose of this provision was to give the Secretary the opportunity to "withhold approval [of the articles] if in his judgment inequities among Native individuals or groups of Native individuals would be created."[63]

In contrast to the diverse constituency served by regional corporations, village governments serve a far narrower constituency. Where regional corporations must balance the interests of all of their shareholders, village governmental bodies must serve the interests of their village members.[64]

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right to enjoy equal rights, preferences, and privileges on his or her shares."); *see also*, Branson, *supra*, at 109-10. Only recently have ANCSA corporations been empowered to create special programs favoring particular groups of shareholders such as the elderly. *See* 43 U.S.C. § 1606(g)(2)(B)(iii)(I). Notably, Congress specifically precluded ANCSA corporations from providing these special programs to shareholders based on their place of residence. 43 U.S.C. § 1606(g)(2)(B)(iii)(II), (IV). In addition, such programs require votes of all shareholders, *Broad v. Sealaska Corp.*, 85 F.3rd 422 (9th Cir. 1996), *cert. denied*, __U.S.__, 117 S.Ct. 768 (1997), as do settlement trusts formed to promote the "health, education and welfare of its beneficiaries." 43 U.S.C. § 1629e(b)(1).

[63] 43 U.S.C. § 1606(e).

[64] *See e.g.*, Br. of *Amicus* Shee Atika, Appendix B at 13a (preamble to IRA Constitution providing that purpose of constitution is to advance interests of tribe); *see also*, 25 U.S.C. §§ 473a, 476 (allowing Alaska Natives having a common bond of occupation, or association or residence within a well-defined geographic area to organize for their common welfare).

Additionally, like any shareholders, ANCSA shareholders owe a duty not to overreach.[65] In the context of corporate law, overreaching includes reaping a benefit to the exclusion or detriment of minority share interests.[66] There is no similar restriction on village governments or their members. As sovereigns, village governments have powers and limitations similar to the federal government. Among other things, villages may legislate, administer justice, and exclude persons from their territory.[67] Although the Indian Civil Rights Act, 25 U.S.C. § 1301 *et al.*, prevents villages from violating individual constitutional rights, those limitations are no greater than the limitations traditionally imposed on the federal government. In other words, short of infringing a fundamental constitutional right, tribes are automatically free to legislate in favor of one particular group to the exclusion of others.[68] Corporations, by contrast, are not granted such broad authority, and must adhere to the strict principle that all shareholders, of like class, be treated alike.

Into this mix of corporate and village authority the Ninth Circuit has imposed Indian Country. In so doing, the Ninth Circuit has done by judicial fiat what ANCSA corporations are precluded from doing. It has given the right to manage corporate assets to a category of shareholders (village residents) who have no legal obligation to represent the interests of their fellow shareholders.

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[65] Branson, *supra*, at 124

[66] *Id.*

[67] Cohen, *supra*, at 248-52.

[68] In enacting legislation favoring or benefiting any particular class of persons, tribes are generally limited to the same extent as the federal government. *See* 25 U.S.C. § 1301 *et al.* (applying protections contained in the Bill of Rights to Indian tribes).

Despite this dramatic result, the Ninth Circuit's dicta that land still held by ANCSA corporations may be designated as Indian Country was entirely unnecessary to its resolution of the dispute before it. In Venetie's case, once the village corporations had deeded the former reservation to the village of Venetie the corporations dissolved.[69] This dissolution not only removed all corporate interests and responsibilities, but it left a complete unity between village member and land owner. That unity does not exist except in the rare case, as in Venetie, where the shareholders and the village residents are not only the same but where the shareholders have elected to deed back to the village its former reservation. Permitting Venetie to exercise its authority over its former reservation (as the Ninth Circuit correctly did) in no way required a determination that all ANCSA lands are subject to Indian Country status.

Similarly, the Ninth Circuit's focus on the fee ownership of ANCSA lands and its reliance on *United States v. Sandoval*[70] and *United States v. Chavez*,[71] ignored the real issue before it. Properly posed, the question is not whether land owned in fee can be Indian Country,[72] but whether land owned by a corporation with both resident and non-resident shareholders can constitute Indian Country under the sole control of the residents of a single village. Congress' resort to the corporate form demonstrates its intent to insure shareholders received the democratic protections underlying corporate law. Unless these protections are to become superfluous the answer to the above question must be in the negative.

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[69] *Venetie*, 101 F.3d at 1289-90.

[70] 231 U.S. 28 (1913).

[71] 290 U.S. 357 (1933).

[72] *Venetie*, 101 F.3d at 1296.

ANCSA's resort to a hybrid corporate form assured the protection of Alaska Native culture without forcing individual Alaska Natives to conform to any particular notion of what Alaska Native life should be.[73] The Ninth Circuit's facile equation of ANCSA corporations with Alaska Native Villages sweeps away much of this promise. Instead, the Ninth Circuit's opinion imposes on Alaska Native shareholders its implicit assumption that all Alaska Native shareholders are also villagers. Because this assumption is empirically incorrect and because it violates the letter and spirit of ANCSA, the Ninth Circuit's opinion should be modified to limit its holding to the facts before it.

II. THE NINTH CIRCUIT'S OPINION WILL GENERATE WIDESPREAD AND PROTRACTED LITIGATION AS ALASKA NATIVE VILLAGES AND REGIONAL CORPORATIONS SEEK TO DETERMINE THEIR AUTHORITY OVER ANCSA LAND.

As a regional corporation Koniag is greatly concerned with the real world result of the Ninth Circuit's opinion. Koniag fears that the indeterminacy of the standard applied by the Ninth Circuit to ANCSA land will result in widespread and protracted litigation as various Alaska Native groups seek to determine the extent of their authority over ANCSA land. This outcome is particularly disconcerting to a regional corporation such as Koniag whose region encompasses 15 separate villages.[74]

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[73] For example, except in limited circumstances, ANCSA prohibits alienation of ANCSA corporate shares. 43 U.S.C. § 1606(h)(1)(B). ANCSA also limits voting rights to Alaska Native shareholders. 43 U.S.C. § 1606(h)(2)(C). These provisions insure that for the indefinite future ANCSA corporations will be responsive to the specific demands of Alaska Native constituents.

Koniag believes that any village may be sovereign and any village and regional corporation may transfer their respective interests in the lands or a portion of them to that sovereign in accordance with standard corporate practices. To hold otherwise, would defeat the very diversity regional shareholders exhibit. Equally, to impose Indian Country on land owned by shareholders who do not choose such a designation or who are precluded from protesting it because they are not residents, defeats this diversity and marginalizes the self-determination guaranteed each Alaska Native under ANCSA.

Consequently, Koniag believes that in cases in which ANCSA corporations maintain whole or partial ownership of land, and have not consented to the assertion of sovereignty over that land, such an assertion is precluded. Under this bright line rule, application of the Ninth Circuit's six part test to ANCSA land would be unnecessary except in cases such as Venetie.

Because of Venetie's unique circumstance, the Ninth Circuit's opinion does not address the necessary consequences of applying its reasoning to the vast majority of ANCSA land. Indeed, because of the complexity of the legal relationships created by ANCSA, it would take a book to plumb the intricacies of the litigation that might result from the Ninth Circuit's reasoning. Koniag does not attempt a book here. Rather, Koniag wishes to provide the Court with just a

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[74] Seven of the villages also contain village corporations although there are only five village corporations as a result of village corporation consolidations. There is one urban corporation (similar to the status of *Amicus* Shee Atika). Two villages have no village corporation because the village corporations merged with Koniag. There are five village corporations in five villages given limited entitlements under ANILCA. Pub. L. No. 96-487, 94 Stat. 2371 (1980) § 1427(e)(3)(A).

brief glimpse of the Pandora's box the Ninth Circuit's opinion is likely to open.

A village's assertion of sovereignty over particular land requires the resolution of three separate issues. First, a court must determine whether the village is a sovereign.[75] Second, the court must determine whether the land over which the village has asserted authority is Indian Country. Third, the court must determine if the action by the village is within its proper authority.[76] None of these issues are easily resolved.

At no point in its opinion does the Ninth Circuit address the question of how much ownership is necessary before a sovereign entity can declare Indian Country status over a particular piece of land. Even if the Ninth Circuit were correct that Native Villages and village corporations were synonymous, the court failed to account for the fact that village corporations own at most only the surface estate to land.

This problem is only compounded in situations, as with Koniag, in which village corporations have merged with regional corporations. Or, in another example from Koniag's experience, where village corporations and regional corporations have received ANCSA land as a joint venture.[77] Although this latter case may seem obvious even under the Ninth Circuit's formulation, a close look and a clever advocate could make it far more

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[75] The question of tribal sovereignty is one traditionally left to the Congressional and Executive branches. Arnold, *supra,* at 3-4. The Department of Interior has accepted the general principle that Native Alaskan villages can constitute separate sovereigns.

[76] *See Montana v. United States*, 450 U.S. 544, 564 (1981). (holding that tribal sovereign power does not reach beyond what is necessary to protect tribal self-government or to control internal relations).

[77] ANILCA, Pub. L. No. 96-487, 94 Stat. 2371 (1980) § 1427.

ambiguous. For example, one of the principle reasons for the joint venture's receipt of the land was that the land had "traditionally played a special role in the history and culture of the Koniag people."[78] Under the reasoning of the Ninth Circuit, there is no inherent bar to one or several of the participating villages from asserting that the land played a particularly important role in their village history and, therefore, the land should be within their sovereign power. In this way, one village might bypass not only the rights of the regional corporation and its shareholders but also the rights of its fellow villages.

The Ninth Circuit's opinion also fails to account for circumstances in which ANCSA land has been sold or conveyed under Section 1613(c)(1) to a non-Native. Neither regional nor village corporations are statutorily barred from selling their interests in ANCSA lands.[79] But the Ninth Circuit's reasoning fails to explain whether or not Indian Country would continue to apply to ANCSA land despite its sale. Even more troubling are those situations in which corporations have already sold portions of their ANCSA selections. Would villages be permitted to effectively nullify those sales by asserting sovereign authority over the land? These issues become all the more baffling when the land in question is neither within or near the village, but distant land selected principally for its economic value.[80]

Of course, before a court could even attempt to resolve whether ANCSA land constitutes Indian Country,

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[78] Alaska National Interest Lands Conservation Act of 1979: Hearings on H.R. 39 Before the House Comm. on Interior and Insular Affairs, 96th Cong., 1st Sess. 1219 (1979) (statement of Edward Weinberg, counsel for Koniag).

[79] *See* Price I, *supra*, at 61 (pointing out that a village corporation could sell its surface estate and invest in assets in Hawaii or Indonesia).

[80] *E.g.*, Arnold, *supra*, at 246.

it would be first required to determine whether a particular village is a tribal sovereign. The procedural history of this case illustrates the difficulty courts will have in resolving this issue alone. Before arriving in the Supreme Court, this case was remanded by the Ninth Circuit to the district court on the sole issue of whether or not Venetie was a tribe.[81] As the Ninth Circuit explained in its first remand to the district court, if a village's status cannot be determined by reference to the Indian Reorganization Act,[82] then "tribal status may still be based on conclusions drawn from careful scrutiny of various historical factors." [83] A less determinate test can barely be imagined.

As this discussion demonstrates, every village and every parcel of land presents a unique set of facts, each one requiring separate analysis by a court. With no real standards by which to judge, however, courts will be forced to engage in a determination more metaphysical than legal or factual.

Contributing to the uncertainty created by the Ninth Circuit's opinion is the well-settled principle that when the assertion of jurisdiction by a state or federal court would interfere with tribal sovereignty those court's must defer to the tribal court.[84] Although Koniag fully supports and encourages the development of tribal court's, Koniag is concerned with the conflicting standards that would likely result from a multiplicity of separate tribal courts resolving disputes over the Indian Country status of ANCSA land. Such a result would make it all the more difficult for regional corporations, as

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[81] *Venetie*, 101 F.3d at 1303 n.7.

[82] 25 U.S.C. §§ 473a, 476.

[83] *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1387 (9th Cir. 1988) (*Venetie I*).

[84] *E.g., Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

well as the people and entities with whom they do business, to predict the outcome of any particular case.

In addition, the Ninth Circuit's formulation places the boards of regional corporations like Koniag in a particularly tenuous position. Regional corporations owe a fiduciary duty to all of their shareholders. Thus, if a village asserted its authority over land wholly or partially owned by a regional corporation, the corporation may have an obligation to challenge that assertion in order to protect the interests of its non-resident shareholders. Failure to carry out that obligation might leave corporation boards exposed to claims of breach of duty.[85]

CONCLUSION

For these reasons *Amicus* Koniag urges that the judgment of the Court of Appeals be affirmed, but that the reasons for such affirmance be limited to the specific facts concerning appellee Venetie.

Respectfully submitted,

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[85] *See* Branson, *supra*, at 120-21 (noting that regional directors must walk a tightrope between favoring a particular village or cultural group and using ANCSA power unreasonably to favor regional interests).

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STATE OF ALASKA,

Petitioner,

v.

NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NAVAJO NATION, THE PUEBLO OF LAGUNA, THE SANTA ANA PUEBLO, THE SHOSHONE TRIBE OF THE WIND RIVER RESERVATION, THE LUMMI NATION, THE ROSEBUD SIOUX TRIBE, THE CROW TRIBE OF INDIANS, AND THE UTE INDIAN TRIBE AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENTS

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United States v. Washington, 641 F.2d 1368 (9th Cir. 1981), cert. denied, 454 U.S. 1143 (1982) 28

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H.R. Rep. No. 1804, 73d Cong., 2d Sess. (1934) 27

H.R. Rep. No. 304, 80th Cong., 1st Sess. (1947), reprinted in 18 U.S.C.A. § 1151, Reviser's Note, 1948 Act (West 1984) 11, 12

Special Message to the Congress on Indian Affairs, 1970 Pub. Papers 564 27

President's Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98 (1983) 27

President's Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, 27 Weekly Comp. Pres. Doc. 783 (1991) 27

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Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (1994) 27

Ruggero J. Aldisert, Logic for Lawyers: A Guide to Clear Thinking (3d Ed. 1997) 20

Richard B. Collins, Indian Consent to American Government, 31 Ariz. L. Rev. 365 (1989) 15

Philip P. Frickey, Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law, 107 Harv. L. Rev. 391 (1993) 15

James E. Lobsenz, "Dependent Indian Communities": A Search For a Twentieth Century Definition, 24 Ariz. L. Rev. 1 (1982) 2

INTEREST OF THE *AMICI CURIAE*[1]

The Navajo Nation is a federally-recognized Indian nation with 225,000 citizens and a territory of over 17 million acres. About 2.8 million acres of Navajo Indian country is located in the Bureau of Indian Affairs' Eastern Navajo Agency, outside of the Navajo reservation proper, and includes the three Navajo "satellite reservations" of Ramah, Canoncito and Alamo (or Puertocito). The Navajo Nation is joined in this brief by eight other federally-recognized tribes. These tribes occupy and govern established Indian country throughout the United States.

The Pueblo of Laguna and the Santa Ana Pueblo are two of the New Mexico Pueblo tribes characterized as "dependent Indian communities" in *United States v. Sandoval*, 231 U.S. 28 (1913). Alaska's position that a federal set aside of land is a prerequisite for finding a dependent Indian community, if adopted by the Court, would reverse *Sandoval* and destroy the Indian country status of Pueblo lands. These *amici* seek to preserve the Indian country status of their lands, over which these *amici* have continuously exercised governmental authority for more than 500 years.

Indian country, as defined in 18 U.S.C. § 1151, includes formal and informal reservations, dependent

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* and their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk.

Indian communities, and trust or restricted allotments. The first reported decision construing the phrase "dependent Indian community" in 18 U.S.C. § 1151(b) concerned the Ramah Navajo community. *United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971). The Ramah Navajos occupy an area of 168,000 acres in a " 'checkerboard' area . . . [where] some of the land was owned by the Navajo Tribe and some was not." James E. Lobsenz, *"Dependent Indian Communities": A Search For a Twentieth Century Definition*, 24 Ariz. L. Rev. 1, 21 (1982). Despite the non-Indian ownership of some of the land there, Ramah was held to be Indian country in *Martine*. Later, in holding that certain state taxes could not lawfully be imposed on contractors building a school for the Ramah children that New Mexico had "abandoned," this Court referred to the Ramah area as the "reservation." *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 834 & n.1 (1982).

"Over time the Interior Department and the [Navajo] Tribe have tried to consolidate as much land as possible in Navajo ownership" in the checkerboard area included in the Bureau of Indian Affairs' Eastern Navajo Agency. *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1419 (10th Cir.), *cert. denied*, 498 U.S. 1012 (1990), *opinion after remand*, 52 F.3d 1531 (10th Cir. 1995). The Navajo Nation and federal government provide virtually all government services there. *Id.* at 1436 (reproducing *Pittsburg & Midway Coal Mining Co. v. Saunders*, No. CIV 86-1442-M (D.N.M. Aug. 22, 1988)); *see Thriftway Mktg. Corp. v. New Mexico*, 810 P.2d 349, 352 (N.M. Ct. App. 1990) (off-reservation Nageezi Chapter of the Navajo Nation "performs similar functions with respect to the health and welfare of its residents as those performed by

a county or municipality in the state government system."). About 90% of the people there are Navajo Indians and the vast majority of land there is owned by the Navajo Nation or otherwise withdrawn for exclusive Navajo use by the United States. *Id.*

Nonetheless, Navajo and federal authority in the area is sporadically opposed by those seeking to avoid criminal prosecution, environmental regulation or Navajo taxation, often in cases where part of a transaction can be said to occur on non-Indian land in the area. *E.g., HRI, Inc. v. United States Environmental Protection Agency*, No. 97-9556 (10th Cir. filed Aug. 27, 1997). Navajo and/or federal authority has typically been vindicated in these cases.[2]

The case now before the Court requires principally an examination of congressional intent in legislation unique to Alaska. *See* Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. § 1601 *et seq.* However, Alaska and the states supporting it here apparently view this case as a vehicle to upset decades of settled law of the

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[2] *See, e.g., United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971) (upholding federal criminal jurisdiction under 18 U.S.C. § 1151(b) over crime committed in Ramah Chapter); *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531 (10th Cir. 1995) (requiring exhaustion of tribal remedies in challenge to Navajo taxes on coal mine located in Tsayatoh Chapter); *United States v. Calladitto*, No. CR 91-356-SC, 19 Ind. L. Rep. 3057 (D.N.M. 1991) (upholding federal criminal jurisdiction under 18 U.S.C. § 1151(b) for crime committed on Navajo fee land in off-reservation Baca Chapter); *Valencia Energy Co.*, 109 IBLA 40 (1989) (Navajo tribal fee lands in Eastern Navajo Agency are "Indian lands" under 1977 surface mining act), *aff'd*, No. CIV 89-758-M (D.N.M. 1994).

federal courts of appeal concerning 18 U.S.C. § 1151(b), whose construction of that provision is remarkably consistent, principled, and faithful to this Court's precedents.

The Navajo Nation and the tribes joining it here file this brief to protect their authority, and that of their trustee, the United States, in off-reservation Indian country.

SUMMARY OF ARGUMENT

This Court first recognized dependent Indian communities as a category of Indian country in a case where a community of self-governing tribal Indians having a special relationship with the United States occupied a territory that had *not* been set aside for their use by Congress. *United States v. Sandoval*, 231 U.S. 28 (1913). Congress later codified that and other decisions in 18 U.S.C. § 1151. *See United States v. John*, 437 U.S. 634, 648 (1978).

In § 1151, "Congress . . . defined Indian country broadly to include formal and informal reservations, dependent Indian communities and Indian allotments." *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993). Land set aside for Indian use by Congress is Indian country under 18 U.S.C. § 1151(a) as formal or informal reservation land. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991); *John*, 437 U.S. at 648-59 (citing *United States v. McGowan*, 302 U.S 535, 537 (1938)).

In contrast, land traditionally occupied and governed by tribal Indians in a community enjoying a special relationship with the United States but not necessarily having a federal set-aside of land is "Indian country" under a *different* subsection of 18 U.S.C. § 1151. That land is the territory of a "dependent Indian community" under 18 U.S.C. § 1151(b). *See John*, 437 U.S. at 648 & n.17.

Employing the analysis of *Sandoval*, the lower federal courts of appeal have developed a remarkably consistent and principled body of law construing 18 U.S.C. § 1151(b). These courts recognize that, although a federal dedication of land in an Indian community may provide evidence of the Indian country status of its territory, federal ownership of land is not the *sine qua non* of Indian country under 18 U.S.C. § 1151(b). If it were (as Alaska and its *amici* urge), § 1151(b) would be rendered superfluous, and such a construction of § 1151 would violate several fundamental rules of statutory construction.

The quarter century of decision making by federal courts applying virtually identical tests could not have escaped the notice of Congress. Congress has repeatedly employed the phrase "dependent Indian community" in recent statutes, with no suggestion of dissatisfaction with the consistent judicial interpretation of that term. The Court therefore should not disturb this mature body of case law, but rather respect congressional prerogative, embrace the collective wisdom of the lower courts, and endorse the test they have developed.

ARGUMENT

I. REQUIRING AN EXPRESS CONGRESSIONAL SET ASIDE OF LAND FOR INDIAN COUNTRY STATUS UNDER 18 U.S.C. § 1151(b) CONTRAVENES THIS COURT'S PRECEDENTS, CONGRESSIONAL INTENT, AND FUNDAMENTAL RULES OF STATUTORY CONSTRUCTION.

The question in this case is whether Venetie land is "Indian country" under 18 U.S.C. § 1151. "Indian country" is defined as:

> (a) all land within the limits of any Indian reservation, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Id. As discussed below, the view of Alaska and its *amici* that dependent Indian community status requires an express congressional set aside of land contravenes the intended and established meaning of § 1151(b).

A. Lands Set Aside by Congress for Indian Use Are "Reservations" Under 18 U.S.C. § 1151(a).

The definition of Indian country in 18 U.S.C. § 1151 is "based on several decisions of this Court interpreting the term as it was used in various criminal statutes relating to Indians." *John*, 437 U.S. at 648. One of those cases is

United States v. McGowan, 302 U.S. 535 (1938). *McGowan* held that an area where Indians live constitutes Indian country if it has been "validly set apart for the use of the Indians as such, under the superintendence of the government" regardless of the name Congress attaches to the area. *Id.* at 538-39 (citation and emphasis omitted) (finding "Reno Indian Colony" to be Indian country). The land set aside for the Reno Indian Colony was not held in "trust" status. *See id.* at 537.

Some Indian reservations are established formally as "reservations" by treaty, act of Congress or Executive Order. *McGowan* spawned the modern cases holding that lands acquired or set aside by Congress for Indian tribes without a "reservation" label are "informal reservations" that constitute Indian country under 18 U.S.C. § 1151(a). *John*, 437 U.S. at 648-49 & n.17; *Potawatomi*, 498 U.S. at 511. In *John*, the Court noted that "three categories of land" comprise Indian country, and that the first category, reservation land, was that "with which we are here concerned." *John*, 437 U.S. at 648. Relying on *McGowan*, the unanimous Court held as follows:

> The Mississippi lands in question here were declared by Congress to be held in trust by the Federal Government for the benefit of the Mississippi Choctaw Indians who were at that time under federal supervision. There is no apparent reason why these lands, which had been purchased in previous years for the aid of these Indians, did not become a "reservation," at least for the purposes of federal criminal jurisdiction at that particular time.

Id. at 649.

Similarly, the tribe in *Potawatomi* occupied land that was not "formally designated 'reservation.' " 498 U.S. at 511. The land was, however, owned by the United States and held in trust for the Potawatomi. *Id.* Relying on *McGowan* and *John*, the unanimous Court found "that this trust land is 'validly set apart' and thus qualifies as a reservation for tribal immunity purposes." *Id.*

Finally, in *Sac and Fox* the Court considered the validity of certain state taxes imposed on Indians within their tribal territory. Justice O'Connor, writing for yet another unanimous Court, observed that "*Congress has defined Indian country broadly to include formal and informal reservations*, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States. See 18 U.S.C. § 1151." 508 U.S. at 123 (emphasis added).

Thus, 18 U.S.C. § 1151(a) encompasses both formal reservations, *see Donnelly v. United States*, 228 U.S. 243 (1913) (Executive Order Indian reservation), and lands set apart by the Government for Indians without a formal "reservation" designation, *John; Potawatomi*. "Dependent Indian communities" are different. That term is derived from *Sandoval*, and their territory is treated in § 1151(b).

B. Under *Sandoval* and 18 U.S.C. § 1151(b), Land Title Is Only One Factor Considered in Determining Dependent Indian Community Status.

The Pueblo Indians in New Mexico occupy the prototypical dependent Indian communities. *Sandoval* decided the validity of a federal statute prohibiting the introduction of liquor into Pueblo lands held in fee simple communally. Although *United States v. Joseph*, 94 U.S. 614

(1877), had held that people of the Taos Pueblo did not constitute an "Indian tribe" under an 1851 act of Congress, the subsequent enabling act for New Mexico prohibited the "sale . . . and the introduction of liquors into Indian country, which term shall *also* include all lands now owned or occupied by the Pueblo Indians of New Mexico." *Sandoval*, 231 U.S. at 37 n. † (emphasis in original, but deleted as to remainder of quotation). *Sandoval*'s holding was not based on the congressional designation of Pueblo lands as Indian country, as Alaska urges. Pet. Br. 20-21. The question in *Sandoval* was not whether Congress had made Pueblo lands Indian country, but whether Congress had the *power* to extend federal liquor prohibitions to those lands. *Sandoval*, 231 U.S. at 38. To answer that question, *Sandoval* focused on the Pueblo communities and their political relationship with the United States, not land status, to determine whether Congress had the constitutional authority to assert federal control there:

> The question to be considered, then, is whether the status of the Pueblo Indians and their lands is such that Congress competently can prohibit the introduction of intoxicating liquor into those lands notwithstanding the admission of New Mexico to statehood.

Id.

In reaching its decision, the Court examined several factors. First, it noted that the Pueblo lands were "held in communal, fee simple ownership under grants from the King of Spain . . . and confirmed by Congress since the acquisition of that territory by the United States." *Id.* at 39. Second, the Court looked at evidence of a cohesive Indian community and the relationship of the Pueblo

Indians to their tribal government, observing that they are "Indians in race, custom and domestic government . . . living in separate and isolated communities . . . and chiefly governed according to the crude customs inherited from their ancestors." *Id.* Third, the Court found that the Pueblo people had "been regarded and treated by the United States as requiring special consideration and protection, like other Indian communities." *Id.* In this respect, the Court observed that federal monies were used to provide them with farming implements, to provide Indian "agents and superintendents to guard their interests," to construct and operate training and day schools at the Pueblos, to construct dams and irrigation works, to reserve public lands for their use in the surrounding area where their own lands were deemed inadequate, and to provide a special attorney to safeguard their rights to be free from state taxes. *Id.* 'at 39-40.

Considering these various factors, the Court upheld federal power to prohibit liquor traffic on Pueblo land. *Id.* at 47. The fact that the Pueblo held its land in communal fee simple under Spanish land grants did not concern the unanimous Court.

> It is true that the Indians of each pueblo do have [a fee simple] title . . . but it is a communal title, no individual owning any separate tract. In other words, the lands are public lands of the pueblo, and so the situation is essentially the same as it was with the Five Civilized Tribes, whose lands, although owned in fee under patents from the United States, were adjudged subject to the legislation of Congress enacted in the exercise of the government's guardianship over those tribes and their affairs.

Id. at 48. *See also United States v. Chavez*, 290 U.S. 357, 363-65 (1933) (holding that the Pueblo of Isleta is Indian country because that term "was intended to include any unceded lands owned or occupied by an Indian nation" although the boundaries of that territory may be " 'sometimes ill-defined.' ") (citation omitted). Neither a federal set aside nor federal ownership of land was a component of *Sandoval*'s functional analysis.

However, the Court cautioned that Congress could not "bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities." *Sandoval*, 231 U.S. at 46. Ultimately, the Court determined that the Constitution's delegation of authority to Congress to regulate commerce with the Indian tribes gave rise to a correlative federal duty to foster and protect "all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and within or without the limits of a state." *Id.* at 45-46.

Notably, Congress codified this exact language of *Sandoval* in § 1151(b). *Compare id.* at 46 *with* 18 U.S.C. § 1151(b). Both the use of that language in § 1151(b) and the legislative history for all of § 1151 make it absolutely clear that Congress intended to codify *Sandoval*, and *Sandoval* alone, in § 1151(b).[3] *Sandoval*'s dependent Indian community analysis applies to § 1151(b). Petitioner's and State *amici*'s efforts to read *McGowan*'s "set apart" and federal ownership requirements into § 1151(b) reveal a

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[3] See H.R. Rep. No. 304, at A92 (1947), *reprinted in* 18 U.S.C.A. § 1151, Reviser's Note, 1948 Act (West 1984), discussed in more detail *infra* part I.C.

basic misreading of this Court's precedents and a misunderstanding of the structure of § 1151 as a whole.

C. Adding an Inflexible Federal Land Set-Aside Requirement to § 1151(b) Would Violate the Intent of Congress.

Congress defined Indian country in a statute. 18 U.S.C. § 1151. This Court's responsibility is to construe that statute, and to do so the Court must determine Congress' intent. *Dole v. United Steelworkers of America*, 494 U.S. 26, 35 (1990). The statute should be read as a whole, because "the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent Hospital*, 502 U.S. 215, 221 (1991). Here, Congress' intent is abundantly clear.

Congress adopted *verbatim* the language of *Sandoval* in § 1151(b). Congress based §§ 1151(a) and (c) on *McGowan* and *United States v. Pelican*, 232 U.S. 442 (1914), respectively.[4] H.R. Rep. No. 304, 80th Cong., 1st Sess., at A92 (1947), *reprinted in* 18 U.S.C.A. § 1151, Reviser's Note, 1948 Act (West 1984); *see generally John*, 437 U.S. at 648. Judicial imposition of a federal land set-aside requirement under § 1151(b) would necessarily be inconsistent with the intent of Congress. The 1948 codification of the criminal code "contemplates, implies, and produces continuity of existing law in clarified form rather than its interruption." *United States v. Grainger*, 346 U.S. 235, 248

[4] This case does not concern the status of allotments under § 1151(c). *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1390 (9th Cir. 1988).

(1953). *Sandoval*, the first true dependent Indian community case and the one Congress expressly sought to codify, required no such federal set aside of land, and, indeed, recognized that the United States had *not* set aside land for fourteen of the twenty New Mexico Pueblo tribes. *Sandoval*, 231 U.S. at 39.

The most fundamental rules of statutory construction would be violated by judicial imposition of a rigid federal land set aside or federal ownership requirement into § 1151(b). First, the starting point for construing an act of Congress is the language of the act itself. *Dole*, 494 U.S. at 35; *United States v. Hohri*, 482 U.S. 64, 69 (1987). Nowhere in 18 U.S.C. § 1151(b) is there even a suggestion that land status is dispositive, although land status clearly *is* dispositive in the surrounding subsections of § 1151. *See* 18 U.S.C. § 1151; *Field v. Mans*, 116 S.Ct. 437, 446 (1995) (the "negative pregnant" argument is strongest when contrasting statutory sections are enacted simultaneously and when it suggests a result consistent with the use of common law language in the statute). Rather, the phrase "dependent Indian community" simply contemplates a community of Indians dependent on federal protection. *See Sandoval*, 231 U.S. at 33-41; *Martine*, 442 F.2d at 1023-24. The language of § 1151(b) requires no federal set aside of land, and such a requirement may not properly be added by judicial fiat. *See generally Pinter v. Dahl*, 486 U.S. 622, 653 (1988) (" 'The ultimate question is one of congressional intent, not one of whether this Court thinks it can improve upon the statutory scheme that Congress enacted into law.' ") (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979)).

Second, land set aside by Congress for Indian people is Indian country under § 1151(a). *John*, 437 U.S. at 649

(Lands were "declared by Congress to be held in trust by the Federal Government for the benefit of the Mississippi Choctaw Indians . . . . There is no apparent reason why these lands . . . did not become a 'reservation'. . . . "); *Potawatomi*, 498 U.S. at 511 ("As in *John*, we find that this trust land is 'validly set apart' and *thus* qualifies as a reservation. . . . ") (emphasis added); *McGowan*, 302 U.S. at 537-39 ("land owned by the United States and purchased out of funds appropriated by Congress" for the Reno Indian Colony is the equivalent of a "reservation"). Imposing a federal set aside of land as a prerequisite to the existence of Indian country under 18 U.S.C. § 1151(b) would render that subsection superfluous, because, in order to qualify as a dependent Indian community under that standard, the land at issue would necessarily be Indian country under § 1151(a).[5] However, statutes should not be construed so as to render any one part redundant or superfluous. *United States v. Alaska*, 117 S.Ct. 1888, 1918 (1997).

Third, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). The phrase "dependent Indian community" is "inherently ambiguous" and must be construed in favor

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[5] This is not to say that land that otherwise might be a "reservation" under § 1151(a) could not also qualify as a "dependent Indian community" under § 1151(b). *See, e.g., United States v. Azure*, 801 F.2d 336, 339 (8th Cir. 1986); *United States v. Castillo*, No. CR 91-489-JP, 19 Ind. L. Rep. 3096 n.1 (D.N.M. 1992). Indeed, the trust land in *United States v. South Dakota*, 665 F.2d 837 (8th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982), discussed *infra* part II.A, qualifies as an "informal reservation" under § 1151(a), *John* and *Potawatomi*.

of the Indians. *Schaghticoke Indians v. Potter*, 587 A.2d 139, 144 (Conn. 1991); *State v. Ortiz*, 731 P.2d 1352, 1355 (N.M. Ct. App. 1986) (analyzing the structure of § 1151, stating that ambiguities in federal legislation concerning Indian country "should be resolved in favor of limiting state jurisdiction" and holding that all land within the limits of the San Juan Pueblo is Indian country). This rule of statutory construction has real constitutional and institutional significance. *See* Richard B. Collins, *Indian Consent to American Government*, 31 Ariz. L. Rev. 365, 374 (1989); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 391, 418 n.158 (1993). Engrafting an inflexible federal land set aside or ownership requirement on § 1151(b) would violate this "eminently sound and vital canon" of statutory construction. *See Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976).

Fourth, Congress adopted the settled judicial construction of § 1151(b) – one that does not include a federal land set aside requirement – in its use of the phrase "dependent Indian community" in statutes passed from 1982 to 1994. Cases have arisen under 18 U.S.C. § 1151(b) in all areas of the country. It is virtually inconceivable that members of Congress could have been unaware of these conflicts and the decisions that resolved them. The courts have agreed fundamentally on the factors to be considered in analyzing such cases. *See infra* part II.A. In at least six instances since the leading cases of *Martine* and *United States v. South Dakota*, 665 F.2d 837 (8th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982), were decided, Congress has employed the phrase "dependent Indian communities" to demarcate areas to be regulated by the

United States and the Indian tribes from areas under state authority.[6]

Where, as here, Congress adopts new laws incorporating the language of a prior law, Congress is presumed to have had knowledge of and adopted the settled interpretation of the incorporated language. *E.g., Field v. Mans*, 116 S.Ct. 437, 443 (1995); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). In addition, by enumerating additional Indian country crimes within exclusive federal jurisdiction under 18 U.S.C. § 1153,[7] Congress has demonstrated its desire to expand federal prosecution of crimes in Indian country, including within the judicially-interpreted limits of dependent Indian communities. *See, e.g., United States v. Levesque*, 681 F.2d 75, 76-78 (1st Cir.) (finding jurisdiction for conviction under § 1153 where

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[6] *See* 42 U.S.C. § 10101(19)(A) (Nuclear Waste Policy Act of 1982 defines Indian "reservation" to include any dependent Indian community); 25 U.S.C. § 3001(15)(B) (Native American Graves Protection and Repatriation Act of 1990 defines "tribal land" to include "all dependent Indian communities"); 25 U.S.C. § 3501(2) (Energy Policy Act of 1992 defines the term "Indian reservation" to include "Indian reservations; public domain Indian allotments; . . . and dependent Indian communities . . . . "); 16 U.S.C. § 470w(14)(B) (1992) Amendments to the National Historic Preservation Act define "tribal lands" to include all dependent Indian communities); 16 U.S.C. § 1722(6)(E) (Public Land Corps Act of 1993 defines "Indian Lands" to include "any land held by dependent Indian communities"); 25 U.S.C. § 3902(3)(B) (Indian Lands Open Dump Cleanup Act of 1994 defines "Indian land" to include dependent Indian communities).

[7] *See* 18 U.S.C.A. § 1153, Hist. & Rev. Notes (West 1984 & Supp. 1997) (concerning eight substantive amendments since 1948).

crime occurred within dependent Indian community), *cert. denied*, 459 U.S. 1089 (1982); *Martine*, 442 F.2d at 1023-24 (same).

In sum, no single " 'talismanic standard,' " such as a federal set aside of land, should control the application of § 1151(b). *Blatchford v. Sullivan*, 904 F.2d 542, 546 (10th Cir. 1990) (quoting *United States v. Mound*, 477 F.Supp. 156, 160 (D.S.D. 1979)), *cert. denied*, 498 U.S. 1035 (1991). Judicial imposition of a wooden "set aside" or federal land ownership requirement would contravene Congress' intent to codify *Sandoval* in § 1151(b). Such a requirement would violate fundamental rules of statutory construction and would contradict this Court's own pronouncements that Congress intended to define Indian country "broadly." *Sac and Fox*, 508 U.S. at 123; *see also John*, 437 U.S. at 649 n.18 (describing 18 U.S.C. § 1151 as a more "expansive" definition of Indian country); *accord Tooisgah v. United States*, 186 F.2d 93, 99 (10th Cir. 1950) (Indian country, as defined in 18 U.S.C. § 1151, has a "broad and flexible definition."); *United States v. Burnett*, 777 F.2d 593, 596 (10th Cir. 1985) (same) (quoting *Tooisgah*), *cert. denied*, 476 U.S. 1106 (1986).

II. THE COURTS OF APPEAL HAVE DEVELOPED A PROPER TEST FOR DETERMINING DEPENDENT INDIAN COMMUNITY STATUS UNDER 18 U.S.C. § 1151(b).

A. The Federal Courts of Appeal Have Developed a Single Test for Dependent Indian Community Status that is Consistent with *Sandoval*.

In the 84 years since *Sandoval* and the 49 years since Congress codified that decision in 18 U.S.C. § 1151(b), the lower federal courts have construed the phrase "dependent Indian community" in numerous decisions. A single test adopted explicitly by the First, Eighth, Ninth and Tenth Circuits, and implicitly by the Second, has emerged. Not surprisingly, the analysis adopted by the lower courts mirrors this Court's multi-factor analysis in *Sandoval*.

The first case construing 18 U.S.C. § 1151(b) is *United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971). In an opinion written by Circuit Judge Seth, the court of appeals affirmed the trial court's conclusion that the Ramah Navajo area is a dependent Indian community. The court of appeals derived from *Sandoval* three factors for evaluating the Ramah community: "the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area." *Id.* at 1023. The *Martine* analysis is consistent with *Sandoval*, *see supra* part I.B., and its holding that the Ramah Navajo area is Indian country is clearly correct, *see Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 834 (1982). The three *Martine* factors form the core of the modern dependent Indian community inquiry.

Martine noted that "other relevant factors" may also be considered, without specifying them. *Id.* at 1024. The Eighth Circuit set forth other factors first, in *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980), *cert. denied*, 451 U.S. 941 (1981), and *United States v. State of South Dakota*, 665 F.2d 837 (8th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982).

The test adopted in *South Dakota* is the one now employed by all the other federal courts of appeal that have addressed the matter.

> In *Weddell* we concluded that whether a particular geographical area is a dependent Indian community depends on a consideration of several factors. These include: (1) whether the United States has retained title to the lands which it permits the Indians to occupy and authority to enact regulations and protective laws respecting this territory; (2) the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area; (3) whether there is an element of cohesiveness . . . manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality; and (4) whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples[.]

South Dakota, 665 F.2d at 839 (internal quotations and citations omitted). The second South Dakota factor subsumes the three *Martine* factors. *Id.* The *South Dakota* analysis finds ample precedent in *Sandoval*. *See supra* part I.B. In sum, *South Dakota* recognizes that the dependent

Indian community inquiry " 'must be a flexible one, not tied to any single technical standard.' " 665 F.2d at 842 (citing *United States v. Mound*, 477 F.Supp. 156, 160 (D.S.D. 1979)).

Taken merely as "other relevant factors" to be considered, as contemplated both by *Martine* and by *South Dakota* itself, these other *South Dakota* factors properly reflect the common historical development of what became the three categories of Indian country.[8] However, when any of these other factors are transmuted to rigid prerequisites, their application becomes artificial and strained. Indeed, the final *South Dakota* factor, "whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples," 665 F.2d at 839, is practically the same as the ultimate standard for Indian country status under § 1151(a). *John*, 437 U.S. at 648-49 ("principal test" applied in *McGowan* is "whether the land had been validly set apart for the use of the Indians as such, under the superintendence of the Government") (quoting *United States v. Pelican*, 232 U.S. 442, 449 (1914)). Were proof of this "other factor" *required* to satisfy

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[8] The common law development of the term "Indian country" by this Court is summarized in *John*, 437 U.S. at 648-49 & n.18. *McGowan*, the seminal § 1151(a) case, was based on *Pelican* and *Ramsey*, the allotment cases presaging § 1151(c), and on *Sandoval*, the dependent Indian community case codified in § 1151(b). *McGowan*, 302 U.S. at 538-39 & nn.9-11. But surely it is a mistake in logic to assert that if the result in *McGowan* was informed by language recognizing dependent Indian communities in *Sandoval* then the facts of *McGowan* must be duplicated in order for a dependent Indian community to exist. *Cf.* Ruggero J. Aldisert, *Logic for Lawyers: A Guide to Clear Thinking* 203 (3d Ed. 1997) (discussing the *non sequitur*).

§ 1151(b), as Alaska urges, the other factors would become wholly superfluous, because the land would necessarily qualify as § 1151(a) Indian country under *John* and *Potawatomi*.

All other federal courts of appeal that have addressed this issue have adopted the *South Dakota* analysis. The Tenth Circuit implicitly adopted the Eighth Circuit's elaboration of *Martine* in *Blatchford v. Sullivan*, 904 F.2d 542, 546-49 (1990), *cert. denied*, 498 U.S. 1035 (1991), and "explicitly adopt[ed]" the *South Dakota* test in *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1545 (10th Cir. 1995). The First Circuit in *United States v. Levesque*, 681 F.2d 75, 77-78 (1st Cir.), *cert. denied*, 459 U.S. 1089 (1982), relied on *Martine*, and observed that *South Dakota* followed much the same approach. Later, that court followed the Tenth Circuit in expressly adopting the *South Dakota* factors. *Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908, 917 (1st Cir. 1996). In turn, the Second Circuit has expressly applied the *Martine* factors, but in fact has considered other *South Dakota* factors. *United States v. Cook*, 922 F.2d 1026, 1031 (2d Cir.) (considering land title and demographics, as well as the three *Martine* factors), *cert. denied*, 500 U.S. 941 (1991).

Finally, in the Ninth Circuit's first decision in the instant case, it noted both the three-part *Martine* analysis and the more detailed *South Dakota* analysis that incorporated the *Martine* factors. *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1389 (9th Cir. 1988). In the decision below, the Ninth Circuit adhered to its acceptance of the

four *South Dakota* factors, with one substantive modification. *State of Alaska, ex rel. Yukon Flats School Dist. v. Native Village of Venetie Tribal Government*, 101 F.3d 1286, 1294 (9th Cir. 1996).[9] That modification elevated a federal set aside of land from a factor to be considered under § 1151(b) to a "prerequisite" for the existence of a dependent Indian community. *Id.* at 1293. As explained above, however, and as the decision below virtually concedes, this break with the other circuits conflicts with *Sandoval*, where there was no federal set aside of land, and with the categorization of informal reservations under § 1151(a), as in *John* and *Potawatomi*, rather than under § 1151(b). *Id.* at 1292-93. *See Sandoval*, 231 U.S. at 48; *Martine*, 442 F.2d at 1023; *Narragansett*, 89 F.3d at 918-19. Thus, but for the error below in elevating a federal land set aside from a factor to a prerequisite, all five circuits that have addressed this issue have reached a unified analysis that is faithful to *Sandoval*.

B. The Lower Courts' Test for Dependent Indian Community Status is Manageable and Predictable.

The principled and common-sense application of the *Sandoval* factors by the lower courts since *Martine* should dispose of the concern of amici California, *et al.*, that

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[9] The Ninth Circuit used the same factors that the Eighth Circuit set forth in *South Dakota*, but split out the second *South Dakota* factor into its three component parts from *Martine* and re-ordered them. Hence, the Ninth Circuit refers to its six-factor analysis, but that analysis is "virtually identical" to *South Dakota*'s four-factor test. *State of Alaska, ex rel. Yukon Flats School Dist. v. Native Village of Venetie Tribal Government*, 101 F.3d 1286, 1294 (9th Cir. 1996).

continued adherence to those factors will result in a chaotic proliferation of dependent Indian communities. The courts have faithfully followed *Sandoval*'s admonition that only "distinctly Indian communities" may qualify as dependent Indian communities. *See Sandoval*, 231 U.S. at 46. For example, in *Martine*, the defendant urged that if the Ramah Navajo community were held to be a dependent Indian community, such a holding would "impl[y] that wherever a group of Indians is found, e.g., in Los Angeles, there is a dependent Indian community." *Martine*, 442 F.2d at 1024. The court rejected that interpretation of § 1151(b), saying "[t]his does not follow. . . . The mere presence of a group of Indians in a particular area would undoubtedly not suffice." *Id.*

Blatchford relied on *Martine*'s admonition in rejecting the proposition that a cluster of primarily Indian dwellings at a highway intersection is a dependent Indian community, because "the primary purpose of the community is not federal protection of dependent Indians but private commercial activity." *Blatchford*, 904 F.2d at 549. Similarly, the Eighth Circuit refused to "expand the definition of a dependent Indian community under section 1151 to include a locale merely because a small segment of the population consists of Indians receiving various forms of federal assistance." *Weddell*, 636 F.2d at 213. *Watchman* considered the functional definition of community as "a mini-society consisting of personal residences and an infrastructure" in determining what could be a dependent Indian community, 52 F.3d at 1543-45, and *Narragansett* found that a federally supported tribal housing project was not a dependent Indian community because it was not sufficiently dependent, 89 F.3d at

921-22. The uniform analysis formulated by the lower courts based on *Sandoval* has proved to be entirely manageable and reasonably predictable.

III. FEDERAL RECOGNITION IS SUFFICIENT EVIDENCE OF THE DEPENDENT STATUS OF AN INDIAN TRIBE.

Amici Navajo Nation, *et al.*, feel compelled to address the demeaning notion of the "dependent" component of the phrase "dependent Indian community" advanced by Alaska and its supporters here. From the earliest Indian law decisions of this Court to the present, the concept of "dependency" has been fundamentally a political dependency, not a physical or economic dependency. In this era of government-to-government respect between the federal and tribal governments, federal recognition of a tribe is sufficient evidence of that dependent relationship.

Congress now requires the Secretary of the Interior to publish annually a list of all federally recognized Indian tribes "eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 479a-1. Congress prohibits the Secretary from removing any tribe from the list, as this would be tantamount to termination. *See* 25 U.S.C. § 1212(3).

In *Cherokee Nation v. Georgia*, 5 Pet. (30 U.S.) 1 (1831), the Court examined the status of the Indian tribes, and introduced the concept of dependency. "They may, . . . perhaps, be denominated domestic dependent nations. . . . [T]hey are in a state of pupilage. Their

relation to the United States resembles that of a ward to his guardian." *Id.* at 17.

Worcester v. Georgia, 6 Pet. (31 U.S.) 515 (1832), underscores the political foundation of tribal "dependency." The Court observed that "the settled doctrine of the law of nations is that a weaker power does not surrender its independence – its right to self-government, by associating with a stronger and taking its protection." *Id.* at 560-61. Finding that the Cherokee Nation was "a distinct community, occupying its own territory, with boundaries accurately described," *id.* at 561, the Court held that Georgia law purporting to govern conduct within Cherokee territory was void, because relations with the Indian nations "are committed exclusively to the government of the Union." *Id.*

In upholding congressional authority to enact criminal laws applicable in Indian country, the Court in *United States v. Kagama*, 118 U.S. 375 (1886), expounded on the concept of dependency as follows:

> These Indian Tribes *are* the wards of the Nation. They are communities *dependent* on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

Id. at 383-84 (emphasis in original); *accord Jones v. Meehan*, 175 U.S. 1, 10 (1899) (quoting *Cherokee Nation*, 5 Pet. (30 U.S.) at 17).

Sandoval itself adverted to the predominantly political nature of dependency. There, the Court observed that the Pueblo Indians "have been regarded and treated by the United States as requiring special consideration and protection, like other Indian communities." The opinion lists several examples of this protection, which focus not on blankets and hand-outs, but on acts of Congress that prohibited taxation of Pueblo lands and that funded resident Indian agents and attorneys, and the provision of schools, dams, additional lands and farm implements. These federal actions, designed to protect the Pueblo people from the avarice of others and to lead to self-sufficiency of the Pueblos, were the predicate of the Court's observations that the Pueblos were "dependent upon the fostering care and protection of the government." *Sandoval*, 231 U.S. at 41; *accord United States v. Chavez*, 290 U.S. 357, 362-63 (1933).

"[I]n respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts." *Sandoval*, 231 U.S. at 46. By a clear statement of its intent to do so, Congress alone may exercise the power to end the dependent relationship. *Re Heff*, 197 U.S. 488, 499 (1905), *overruled in part on other grounds, United States v. Nice*, 241 U.S. 591 (1916).

The assimilationist policies of the late 1800s and early 1900s were replaced by those promoting tribal self-government and self-sufficiency. In 1934, Congress passed the Indian Reorganization Act " 'to give [the Indian] a chance to develop the initiative destroyed by a century of oppression and paternalism.' " *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess., at 6 (1934)). The overriding goal of federal policy is now "tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-17 (1987); *see, e.g.*, 25 U.S.C. § 450, *et seq.*

Federal policy in the 1990s springs from President Nixon's "self-determination without termination" policy. Special Message to the Congress on Indian Affairs, 1970 Pub. Papers 564, 565. The Reagan administration "underscore[d] its commitment to recognizing tribal governments on a government-to-government basis" while committing to fulfill the federal trust responsibility "in accordance with the highest standards." President's Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98, 99-100 (1983). The government-to-government relationship was described as the "cornerstone of the Bush-Quayle administration's policy of fostering tribal self-government and self-determination." President's Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, 27 Weekly Comp. Pres. Doc. 783 (1991). President Clinton reaffirmed that policy by instituting guidelines to "ensure that the federal Government operates within a government-to-government relationship with federally recognized Native American tribes."

Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (1994).

In this context, Alaska's view that "dependency" means Indians lining up for rations at the fort is untenable. In *Sandoval*, as now, tribal dependency is predominantly a *political* dependency. That political relationship is an "ongoing" one. *Bryan v. Itasca County*, 426 U.S. 373, 388 n.14 (1976) (quotation and citation omitted). "The needs of Indian people must necessarily change with the years, and the method of supervision over them by the United States must change accordingly." *United States v. Mound*, 477 F.Supp. 156, 160 (D.S.D. 1979). Tribal self-determination and self-sufficiency form the goals of current congressional policy. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987). Therefore, tribes should not be penalized for success in regaining – from the United States – "greater control over their own destinies." *Morton v. Mancari*, 417 U.S. 535, 553 (1974); 25 U.S.C. § 450(a)(1).

Conversely, because of the historic vacillations in federal policy, "[a] degree of assimilation is inevitable . . . and does not entail the abandonment of distinct Indian communities." *United States v. Washington*, 641 F.2d 1368, 1373 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). Thus, the provision of services by a state or its subdivision to an area traditionally occupied and governed by Indians should not defeat Indian country status. *See Donnelly v. United States*, 228 U.S. 243, 267 (1913) (creation and operation of school district by state did not defeat "Indian country" status of Indian reservation); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164,

172-73 & n.12 (1973); *John*, 437 U.S. at 652 & n.23; *Levesque*, 681 F.2d at 78 (assertion of state criminal jurisdiction for nearly 200 years over Passamaquoddy Indians did not defeat finding of dependent Indian community after federal recognition in 1979); *South Dakota*, 665 F.2d at 840-42; *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975) ("Voluntary assistance rendered by a state to a tribe is not necessarily inconsistent with federal protection."); *Shepherd v. Platt*, 865 P.2d 107, 110 (Ariz. Ct. App. 1993) (Tribal people in Indian country "are entitled to the same [county] benefits as non-Indian residents.").

"Dependency" is primarily a political dependency in an era where federal policy encourages tribal self-government and self-sufficiency in the context of government-to-government respect. Federal recognition of a tribe is sufficient evidence of that government-to-government relationship and the commitment of the United States to protect tribal autonomy and well-being. *See McClanahan*, 411 U.S. at 168-69; *The Kansas Indians*, 5 Wall. (72 U.S.) 737, 755 (1867). Federal recognition of a self governing Indian community is conclusive of its "dependent" status.

CONCLUSION

Sandoval found that each of the twenty Pueblo Indian tribes were "dependent Indian communities" which occupied Indian country, even though there was no federal set aside of land for fourteen of them. In 1948, Congress codified *Sandoval* in 18 U.S.C. § 1151(b), and did not then

or at any time thereafter impose a federal land set aside or ownership requirement.

The federal courts of appeal have construed § 1151(b) in a consistent and common-sense manner. The test agreed on by the federal courts of appeal is true to *Sandoval*'s own multi-factor analysis. Respondent satisfied the Ninth Circuit's version of that test, even though the Ninth Circuit incorrectly elevated a federal set aside of land to a "prerequisite" for a dependent Indian community, rather than simply one factor to be considered.

Congress employed the phrase "dependent Indian community" in at least six statutes passed from 1982 to 1994. Congress should be presumed to have adopted the consistent judicial interpretation of § 1151(b) anchored in *Martine* and *South Dakota*. Therefore, unless ANCSA constitutes a clear statement by Congress of its intent to end the special relationship of Venetie with the federal government, this Court should apply the *Sandoval* factors as developed in *Martine* and *South Dakota*, and affirm.

Respectfully submitted,

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